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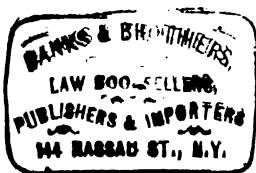
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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NOVA SCOTIA.

REPORTED BY
BENJAMIN RUSSELL, M. A.,
AND
JOHN M. GELDERT, Jr., LL. B.,
Barristers-at-Law.

VOLUME V.

1883-84.

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JUDGES OF THE SUPREME COURT

DURING THE

PERIOD OF THE DECISIONS REPORTED IN THIS VOLUME.

Chief Justice.

THE HONORABLE JAMES McDONALD.

(Appointed May 20th, 1831.)

Judge in Equity.

THE HONORABLE ALEXANDER JAMES.

(Appointed Assistant Judge January 8th, 1877. Appointed Judge in Equity
July 24th, 1882.)

Assistant Judges.

THE HONORABLE HUGH McDONALD.

(Appointed November 5th, 1873.)

THE HONORABLE HENRY W. SMITH.

(Appointed January 15th, 1877.)

THE HONORABLE ROBERT L. WEATHERBE.

(Appointed October 7th, 1878.)

THE HONORABLE SAMUEL G. RIGBY.

(Appointed December 17th, 1881.)

THE HONORABLE JOHN S. D. THOMPSON.

(Appointed July 24th, 1882.)

Attorney General.

THE HONORABLE ALONZO J. WHITE.

(Appointed August 3rd, 1882.)

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CASES

DETERMINED BY THE

SUPREME COURT OF NOVA SCOTIA,

DURING THE TERM

DECEMBER 1883 TO APRIL 1884,

(Continued.)

MCDONALD v. MCCUISH.

Before SMITH, WEATHERBE, RIGBY and THOMPSON, J J.

(Decided December 15th, 1883.)

Canada Temperance Act.—Appeal from order of County Court Judge quashing conviction.—Costs on Appeal.

A conviction by a Stipendiary Magistrate was removed by appeal to the County Court and there quashed.

Held, that no appeal lay to the Supreme Court as none was expressly given by the act creating the offence and giving the appeal to the County Court, although the acts creating and organizing the County Courts gave a general appeal to the Supreme Court.

Costs refused to the respondent as he should have moved to quash the appeal at an earlier stage.

The defendant, on the information of Michael A. McDonald, was convicted by two Justices of the Peace of the County of Cape Breton of having sold intoxicating liquor in contravention of the provisions of the Canada Temperance Act of 1878, for which offence he was adjudged to forfeit and pay the sum of fifty dollars as a penalty for such infraction of the law, to be paid and applied according to law, and also to pay the said Michael A. McDonald the sum of fifteen dollars and thirty-two cents for his costs in this behalf, and if the said several sums be not paid within ten days from the date hereof, that the same be levied by distress and sale of the goods and chattels of the said Alexander McCuish, and in default of sufficient distress, the said Alexander McCuish to be imprisoned in the common jail of the said County of Cape Breton at Sydney aforesaid, there to be kept for the space of two months unless

the said several sums and all costs and charges of the said distress and of the commitment and conveying of the said Alexander McCuish to the said gaol be sooner paid.

The conviction so made was set aside with costs by B. E. TREMAINE, Esq., County Court Judge for District No. 7, on motion of defendant's counsel, on the grounds, 1st, that a copy of the summons only had been served upon the defendant, and, 2ndly, that the conviction contained, besides the penalty, a period of imprisonment, and the judge had no power to amend under the Act.

From this decision an appeal was allowed to the Supreme Court.

Borden in support of appeal.—The only question that arises is whether the conviction is in the form given by the Summary Convictions Act. Section 50 gives a form of conviction. Sections 57 and 62 give the justice power to enforce the conviction. The form in the Summary Convictions Act is to be used in all cases where no other form is prescribed. There is no case in which it should be used if not here. Sections 50, 57 and 62 are incorporated in the Canada Temperance Act. The Judge should not have quashed the conviction but should have amended it and tried the cause anew which the statute provides, section 68, that he shall do. (RIGBY, J.—That point was taken below. I do not see how the Judge got over it.) Sections 117 and 118 of the Canada Temperance Act are even stronger.

Sedgewick, Q.C., contra.—The conviction was in excess. Assuming that the Canada Temperance Act, sec. 117, expressly prohibits the Judge from amending, the statute gives no authority to imprison except to the justice issuing the warrant. The justices have done certain things that they had no power to do because the power was given expressly by the statute to another justice. The meaning of the legislature is shown by the description of the conviction in the Summary Convictions Act. The penalty for the offence is to be levied by distress and in default of distress by imprisonment. It is expressly provided that the forms may be varied to meet the case. This conviction is bad because it takes away the opportunity to

oppose the infliction of imprisonment. The magistrates have limited the time of imprisonment. They had no right to do this at the trial. They should have waited until it was made to appear that there were no goods. The time is to be prescribed in the warrant of commitment. The Summary Convictions Act comes in and says that in certain cases the distress may be dispensed with, but this is where sufficient reason is made to appear on the application for the warrant. A conviction is as bad if the punishment awarded is smaller than that provided by the statute as if it is in excess; *Paley on Convictions*, 267, 283. There is nothing in the statute to authorize the justices to require payment of the penalty in the time fixed by them. The conviction is bad because it delays payment and because it is excessive. The Canada Temperance Act was never proved to be in force in the County of Sydney, or that the magistrates had jurisdiction below. (RIGBY, J.—The intention of the Act is that there shall be a final adjudication notwithstanding any error of substance or form. You say he cannot amend.) He can amend but he is not bound to do so. The amendment may depend on circumstances. There is no appeal from the County Court to this Court in criminal matters. The Local Legislature has no power. (THOMPSON, J.—It creates the court. The Dominion Legislature may then come in and regulate procedure in matters over which they have jurisdiction. WEATHERBE, J.—Can they not add to the jurisdiction for their own purposes?) The right of appeal is purely statutory. He has jurisdiction as to this but there is no procedure for the appeal. The Dominion Legislature gives no appeal and the decision is therefore final. A writ of certiorari or a mandamus would lie by common law. The court has jurisdiction similar to that of the court of Quarter Sessions. There was no appeal from the sessions unless upon a case reserved. (WEATHERBE, J.—Could the Dominion Legislature pass an Act saying that there shall be an appeal from the County Court to the Supreme Court?) Yes. (WEATHERBE, J.—Then the Local Legislature cannot. RIGBY, J.—The question is whether when the Dominion Legislature gave an appeal to the County Court, a court which has no final jurisdiction, it did not virtually say that there should be an

appeal from the County Court to this court. It is not said that the judgment of the County Court Judge is to be final.) Cites chapter 27, Acts of 1877. The jurisdiction of the Supreme Court was taken away and transferred to the County Court. It could not have been the intention that there should be an appeal. The right to remove proceedings by certiorari is expressly taken away while the right of issuing mandamus remains. By Acts of 1874, chap. 18, sec. 51, the appeal is limited to causes between \$40.00 and \$80.00. The County Court is constituted a court with special criminal jurisdiction. (RIGBY, J.—The question is whether if the Dominion Legislature wished to eliminate the element of appeal they should not have done so in express terms.) In the *Queen v. Todd* it was held that there was no appeal unless it was given in express terms; 1 R. & C., 62. This court cannot enforce a penalty. (Graham, Q.C.—The court can remit the papers to the County Court and direct the County Court Judge to enforce it. THOMPSON, J.—It seems to me that is all that we can do.) If the appeal is given to this Court impliedly it is the same as if it had been given expressly and would remain if the County Courts were abolished. The Local Legislature has only given appeals from the County Court in civil matters. The Dominion Legislature for the purpose of carrying out the laws of Canada have adopted the County Court which is equivalent to creating a new court.

Graham, Q.C., in reply cites *Chapter 27, Acts, 1887*, sec 1, under which the appeal is given to the County Court. Under this section the legislature of the Province may constitute a court of appeal. If the Local Legislature has provided a court of appeal from justices that shall be the court of appeal under the Act. It contemplates a court in existence by virtue of the local legislature.

The matter here is not criminal. The County Court judge should have tried the cause.

THOMPSON, J., (December 15th, 1883,) delivered judgment as follows :—

No express provision has been made for an appeal to the Supreme Court from the decisions of the County Court in such

a case as that before us, which went to the County Court by appeal from justices who made a conviction under the Canada Temperance Act of 1878. During the argument I was strongly inclined to think that an appeal to this Court would lie, in consequence of the constitution and practice of the County Courts being such that every suitor, where the amount in controversy exceeded a certain sum, had the right of appeal. It would probably be carrying that view too far, however, to apply it to cases which go to the County Court by way of appeal under enactments creating statutory liabilities, and giving an appeal to the Court, but conferring no farther right of appeal. The decisions against appeals being given by implication seem to lead to the conclusion that the appeal cannot be sustained—such for instance as *Rex v. Justices of Surrey*, 2 T. R., 54; *Rex v. Skane*, 6 East., 516; *Regina v. Stock*, 8 A. & E., 405; and *Rex v. Hanson*, 4 B. & Ald., 519. This appeal, therefore, and those which are depending on its result, must, in my opinion, be dismissed, although I think that the judge of the County Court erred in quashing the conviction on motion and argument, instead of trying the cause *de novo*.

There should be no costs, however, as there was no jurisdiction here to entertain the appeal and no application to have it set aside. The appellee in fact allowed the costs to be incurred by letting the cause go to argument, when he might have stopped it much sooner.

DOBSON v. McKAY ET AL.

Before McDONALD, C. J., and McDONALD, RIGBY, and THOMPSON, J J.

(Decided January 7th, 1884.)

Replevin.—Joint detention.—Property not taken out of Plaintiff's possession.—Champerly.

CHATELLE were sold by plaintiff to one S. Defendant, McK., claiming a right to them, took them from S., who demanded and received back the purchase money from plaintiff.

Held, that plaintiff could recover in replevin notwithstanding the sale to S., and although the goods were not in his possession when taken, McK. having seized the goods and deposited them with M., who held them on account of R., the other defendant.

Held, McDONALD, C. J., dissenting, that both defendants were liable.

This was an action of replevin to recover from the defendants two iron strapped patent single blocks, of the value of

five dollars, which they were alleged to be unjustly detaining. Defendants pleaded, among other things, that "at the time of the alleged taking the plaintiff was not in possession of the said goods or any of them."

The cause was tried before SMITH, J., at Sydney, August, 1881, when a verdict was found for plaintiff.

The blocks in question were sold by plaintiff for five dollars, to one Sparking, who was master of the brigantine *Ecliptic*. The day following the one on which the blocks were paid for they were taken out of the possession of Sparking by one of the defendants, who claimed them. Plaintiff thereupon refunded to Sparking the money paid for them. A written demand for the blocks was served upon the defendants, with which they refused to comply, and the action was then brought.

The rule was taken on the following, among other grounds:—

Because at the time of the alleged taking by the defendant McKay, plaintiff had neither the possession nor the right to the possession of the goods, the subject of the action.

Because the transfer to plaintiff by the then owner of the goods, after the alleged taking, was an act of champerty or maintenance which would prevent plaintiff from recovering in this action.

Because there was no evidence to show that the goods were ever in possession of defendant, McKay, after plaintiff purchased them.

Because the plaintiff's writ contained no allegation of a taking by the defendants, or either of them.

Borden, in support of rule.—The assignment was not valid, the goods being held adversely at the time. If the assignment vested anything at all it was something which could only be enforced in the name of the assignor, and if plaintiff could not maintain such an action he cannot bring replevin. No taking is alleged in the writ. (RIGBY, J.—But the action may be brought now for an unlawful detention.) The plaintiff cannot rely on an unlawful taking unless it is alleged. There is no evidence of a joint detention, and without this plaintiff cannot succeed. (MCDONALD, J.—Assuming the property to be that of the plaintiff, and he

demands it, and the defendant detains it, do you mean to say the plaintiff cannot sue for the detention?) The only question submitted to the jury was the identity of the blocks. They were not instructed and do not appear to have found on the question of detention. There is no evidence of notice or demand. In reference to the assignment cites *1 Waterman on Trespass*, sec. 37; *Addison on Contracts*, 193, 194. As to necessity of notice cites *Inglis v. Greenwood*, 2 R. & G., 2.

Drysdale, contra.—*Inglis v. Greenwood*, 2 R. & G., settles that the action will lie. In *Wallace v. Laidlaw*, 2 R. & G., it was held that no demand was necessary, the taking being unlawful. From these decisions it is clear that where there is an unlawful detention replevin will lie, no matter from whom possession was derived. It may be brought as trover might have been brought. Admitting that plaintiff sold the property, it reverted in him by the repayment of the money. (RIGBY, J.—Can a person pass a right to property in the possession of a third person who claims adversely?) The defendants do not set up property in themselves. The contention was that plaintiff purchased a chose in action. (RIGBY, J.—Dobson bought from a person who was out of possession. He had a right to possession which is just what you claim. He transferred to you the right to bring the action.) The contract was a verbal one, which could be rescinded. There is no complaint of non-direction. There is evidence that McKay held the property by his agent, under his directions. Where property is unjustly detained you cannot couple a principal and agent. There is the strongest evidence that the goods were in the constructive possession of McKay. (RIGBY, J.—The difficulty is that the jury only found on the one question, as to the identity of the property. I admit that the evidence is strong, but the jury should have passed on it.) A verdict will not be disturbed for non-direction, there being no misdirection, unless the Court is of opinion that the verdict would have been the other way if the question had been submitted. Defendants were wrongdoers and do not justify under any one. McKay admits the receipt of the demand. The evidence is conclusive as to the relation between McKay and Martin. They were acting

together. It was conceded at the trial and the defendants not having asked then for direction, cannot now complain of non-direction. (McDONALD, J.—The Judge told the jury that the question of identity was the only issue for them to consider. RIGBY, J.—You cannot sustain the verdict unless that was the only issue.) The evidence as to joint detention was strong enough to justify the direction; 24 U. C. Q. B., 277; 4 Allen, 329; 16 U. C. C. P., 379; 16 U. C. C. P., 63; 17 U. C. C. P., 358; 43 U. C. Q. B., 271; 1 Moo, P. C. C., (new series,) 101, 118 to 122. As to sale of personal property, Selwyn's N. P., vol. 2, pp. 13, 33. Property is passed without delivery; Roscoe's N. P., 929. As to duty of counsel to ask the Judge to direct the jury cites Chitty's Arch., 1520.

Borden, in reply.—There is evidence that after the property was left with Martin he held for Robinson and McKay had nothing to do with it. McKay swears that he never had the property in his possession at all. If there is any matter for argument about the evidence, it should have been put to the jury. There was no rescission of contract here any more than if the plaintiff had sold a farm. There was a complete sale and delivery and, after that, a sale back. The right, if any, under the latter sale could only be asserted in the name of the assignor. (McDONALD, J.—There was a transfer of property and the action results from a subsequent detention.) The contention is that the counsel, after taking points on the non-suit, should not be assumed to concede them. It is not reasonable that he should be obliged to ask the Judge to charge the jury on such points.

THOMPSON, J., (January 7th, 1884,) delivered judgment as follows:—

The rule *nisi* for a new trial in this case must be discharged. The point chiefly urged was that the transfer of the blocks replevied was made to the plaintiff while the same were held and claimed by a person other than the transferor, and that, therefore, the transfer was champertous and conveyed no title, or at most was the mere assignment of a chose in action, giving no right to the assignee to sue at law. Plaintiff owned and possessed the blocks for years, and, on the

1st of September, 1879, he sold them for \$5 to one Sparking. On the 5th of September Sparking paid the \$5, but on that day, or the next, the blocks were seized under a claim set up by the defendants, or one of them, that the plaintiff had not been the lawful owner of them, but had got them under such circumstances as entitled the defendant, McKay, to claim them as receiver of wrecks. Sparking immediately came to the plaintiff and demanded to have his money back, in consequence of his title having been thus impeached, and the \$5 was repaid him, and plaintiff made his demand and commenced this action. The plaintiff did not purchase a title from Sparking to the property, nor any right of action, nor does he seek to recover under Sparking. I look on this as simply a rescission of the contract of sale with Sparking, a rescission which is not impugned on the ground of bad faith, and I think that such a rescission could not be regarded as a champertous sale to the plaintiff by Sparking of a thing in dispute, or as an assignment of a chose in action. The next point urged was that the jury should have been asked to find whether demand was actually made on the defendants. No attempt was made to set up any right of property in the defendants, or to justify the taking or detention, and I doubt very much whether a demand was necessary. The transactions between the plaintiff and Sparking having been rescinded, are to be viewed as if they never had been, especially as the taking was under an assertion of right against the plaintiff, and not merely as against Sparking. The evidence as to a demand is that on the 8th September plaintiff told McKay, in presence of some other persons, that the blocks were his, and that he would have them and had "taken steps then." One of the persons present, the person who seems to have set McKay in motion, told plaintiff that he might go ahead. The same day, in the evening, plaintiff identified the blocks and claimed them in the office of the other defendant, Martin, and in the presence of the latter. A few days before the action Martin refused the plaintiff permission to see the blocks, and dismissed him from his premises. There was a letter containing a demand which plaintiff swears he gave to Martin two days before the issue of the writ, McKay being present. He says

they both read it and refused to give up the blocks, Martin being spokesman. Again, when the writ was served on Martin he refused, after consultation with McKay, to give up the blocks. Donald Johnston, a constable, testifies that he took the blocks by order of McKay, and afterwards carried them to the premises of Martin, (who was an auctioneer,) that McKay cautioned him not to give them to plaintiff, and both defendants admitted that plaintiff had made a demand on them for the blocks. McKay admits the receipt of a letter from the attorney who signed the letter expressing the demand, in evidence; he could not say whether the one produced was a copy or not; he admits that what plaintiff alleges as having occurred when the letter was delivered to Martin, may have taken place. He denies having had a conversation with plaintiff on the day when plaintiff says he made the first demand, but does not deny that plaintiff then made the demand, and that Robinson, as the spokesman and originator of the whole proceedings refused to deliver, in his presence. He leaves all the rest of the statements above detailed uncontradicted. Martin denies that plaintiff *demand*ed the blocks when he alleges he first identified them at his office; he does not deny that plaintiff claimed them, which is what plaintiff had testified to, but says plaintiff admitted he could not swear to the identity of the blocks then exhibited, —which is quite immaterial, because it is admitted that they were the same blocks and the jury have so found. He leaves the other evidence as to demand and refusal uncontradicted, but says, "the reason I did not give up the blocks was I considered it would have been a breach of trust to give them up to any one but Robinson." So far as appears in this suit Robinson had no right to them whatever. The blocks had been altered for some unexplained reason before plaintiff was allowed to inspect them; and I take the admission just quoted to be virtually an admission of a demand and refusal. John Lorway was present at the identification and says, "Plaintiff said the blocks were his, but admitted he could not swear to them." "The alteration made in them," he says, "might deceive the owner."

I think there was ample evidence to go to the jury of a

demand,—that that evidence was not contradicted except in immaterial parts,—and it appears to me that at no stage of the trial was any point of this kind taken or the Judge asked to direct upon it. If he had been so asked, his direction should, I think, have been that the evidence was all with the plaintiff. See *Kelly v. Jackson*, 6 Peters (U.S.), at p. 632.

The objection to the defendants being jointly sued does not appear to present any substantial difficulty. McKay took the blocks and deposited them with Martin. They both conferred and refused to give up the property. Martin had the actual possession but was acting under McKay's directions.

There can be no dispute as to Martin's detention of the blocks, and I think the evidence is clear throughout that McKay detained them as fully as one can be said in law to be detaining goods which are not in his possession in a physical sense. He says they never were in his possession, but he admits that he went with Johnston to the vessel to get them,—that he demanded them,—told Johnston to take them; that he went off with Johnston who had them. And then there are the facts before stated with regard to demand and refusal.

McDONALD, J.—The writ in this cause charges the defendants with unjustly detaining the blocks in question, not with the original wrongful taking of them; and it is quite clear that while Sparking may have a cause of action for the original wrongful taking of the property out of his possession, when he was entitled to that possession, the plaintiff has his right of action for the wrongful detention of the possession of it from him after *he* became entitled to such possession and after a demand and refusal of the same. There is no agreement that Sparking and the plaintiff are to have a common interest in the result of this suit or in the property in question, but the evidence shows the contrary; nor is there a shadow of a foundation for saying that the cause of action in this case was purchased by the plaintiff from Sparking. The two causes of action are entirely distinct, the one accruing to Sparking, the other to the plaintiff. Therefore it is clear that there was no champerty in this case. In this view of it, the only difficulty I felt was that the detention

mentioned in the writ, being evidenced only by a demand and refusal to give up the property, and that evidence being somewhat contradictory, there might be something in the contention that the question should have been left to the jury. But, after carefully reading the evidence I think that, if it had been so left, and if a verdict had been returned for the defendants on the ground that there was no demand and refusal, such as I have mentioned, that verdict would necessarily have to be set aside as being against the strong preponderance of evidence. Besides, that objection was not taken at the trial, as I think it should have been if intended to be relied upon, although the ground was taken that there was "no evidence of any detention by McKay," which, as I suppose, means that McKay was not a party to the detention with the other defendant. I think, however, that the evidence shows a joint detention on the part of the two defendants and that they are equally liable. In *Ex parte Frith, in Re Cowburn*, 51 L. T. R., N. S., Ch. Div., 479, the rule is laid down that if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point succeeding, it cannot be taken afterwards.

I think the rule *nisi* for a new trial must be discharged with costs.

RIGBY, J.—It was claimed on behalf of the defendants that the verdict in this cause should be set aside because the re-sale of the blocks to the plaintiff by Sparking, after they had been taken out of the possession of the latter and were adversely claimed by Martin as the property of Robinson, was in fact the sale of a right of action. In *Parsons on Contracts*, 4th edit., p. 195, it is, however, laid down that "after the conversion of a chattel the owner may sell it so as to give the purchaser a right to claim it of the wrong-doer." And in a note referring to *Hall v. Robinson*, 2 Comst., 293, cited as one of the authorities for this proposition, the author says, "it will be observed that this case furnishes no exception to the rule that a right of action for a tort cannot be assigned. It merely decides that the owner of a chattel may sell it and convey a good title to it notwithstanding it has been wrong-

fully converted, and then the vendee may demand it in his own right, and, upon a refusal to deliver it, bring his action not for the conversion done to the vendor, but for the conversion done to himself by such refusal." This seems to me to be the correct principle, and I am of opinion that Sparking could transfer his property in the blocks to plaintiff notwithstanding that they were at the time in the possession of and claimed by third parties, and that the purchaser could maintain an action against the latter for their conversion after demand.

I quite agree with my brother Thompson that the evidence of such demand having been made is all with the plaintiff, and I also think there is sufficient uncontradicted evidence of a *joint* conversion of the property by defendants to justify us in setting aside a verdict for defendants based upon any other hypothesis. The blocks were taken out of Sparking's possession and deposited with the defendant Martin by a constable, acting under the authority of defendant McKay; and, on cross-examination, plaintiff stated that Martin admitted that he had the blocks when the writ of replevin was issued, and that he and McKay, when the writ was served, consulted together and Martin then refused to give them up. This conclusion is quite consistent with the statement of Martin, that he held the blocks for Robinson, for it appears that he and McKay were both acting in the interests of that person. It is true that there is evidence that the blocks were never in McKay's possession, but this undoubtedly refers to his *manual* possession, for they certainly were in his possession constructively when the constable seized them by his command and deposited them with Martin; and the evidence is uncontradicted that they remained under his control until they were replevied.

I think the rule for a new trial should be discharged with costs.

MCDONALD, C. J.—Action of replevin to recover two ships' blocks, "which Alexander McKay and Robinson unjustly detain, as is said." Writ issued 8th October, 1879. Pleas:

- 1.—Did not take or detain.
- 2.—Goods not property of plaintiff.

3.—Plaintiff not possessed at time of taking.

4.—Goods placed in defendant's care by one Robinson, claiming to be owner, and that plaintiff did not demand before action brought.

The facts, as proved on the trial, are substantially and shortly as follows:—The plaintiff Dobson was the owner and in possession of the blocks claimed in the writ, for some time. On the 5th September, 1879, he sold them to one Sparking for the sum of five dollars, and they were delivered to the purchaser on board his vessel at North Sydney. On the evening of the 6th September the defendant McKay, with one Johnston, a constable, went on board Sparking's vessel, and Johnston, by direction of McKay, who was a magistrate and wreck master in the county, took away the blocks in question, and on the same or the following day delivered them to Martin by direction of McKay. The blocks remained in the possession of Martin, (who claimed to hold them for and on account of one Robinson,) till replevied in this suit. There is no evidence that this property was at any time in the possession of or under the control or disposition of McKay after it was delivered by the constable, Johnston, to Martin, as the agent of Robinson, unless the statement that McKay was present and consulted by Martin when the latter refused to deliver up the property on demand, can be deemed such. The plaintiff's testimony is as follows:—

“Martin did not appear to know anything about the blocks; they were acting under Robinson's instructions; Robinson claimed they belonged to the *Putnam*. * * * I never saw the blocks after I saw them going on board the *Putnam* until I saw them in this Court House. The *Ecliptic* arrived about the 1st of October,—between the 1st and the 6th. I took the mate of *Ecliptic* to Mr. Martin's office. I told him this was the mate of the brig, to whom I had sold the blocks. Robinson was there too. I asked him to let me see the blocks, as well as the mate. I said I wanted the mate to identify the blocks as those taken from the ship. Martin said he couldn't without permission from Robinson. Martin and Robinson held a private conversation, and I heard them say “No, we won't.”

On his cross-examination he said :—"From the 8th September to the 8th October I recognized Robinson as the sole controller of and agent of the *Putnam* and what belonged to her. I never knew McKay to have possession of these blocks. I did not claim the blocks from McKay personally, on board the *Putnam*; * * * when the blocks were taken out of the *Ecliptic* they belonged to the captain of the vessel. I never had possession of the blocks since I sold them to the captain. The blocks had been taken from him and when I re-purchased them from him Martin refused to let me see the blocks without permission. Robinson came in and consulted with Martin, and then Martin said he would not. Defendants always seemed to be acting for Robinson. * * * I believe the blocks were in Martin's possession when replevin issued.

The statement of the constable Johnston is as follows :—"Recollect vessel *Ecliptic*; on the evening of the 6th September, 1879, went on board at the instance of Alex. McKay, defendant; he was with me. He told me I was taken on board to seize some stolen property from the *Putnam*. I had no process; he did not speak to me as a magistrate; I knew him to be one. After a little while McKay pointed out the blocks, we took them, and he told me to keep possession of them. He did not mention anything about Robinson. * * * There was some mention made of Dobson next morning in presence of McKay. Next morning I got notice from McKay to carry the blocks to Martin's office. I told McKay on the 8th that I had a demand from Dobson, and I think McKay said he had one also. It was after I had the conversation with McKay that he told me to carry the blocks to Martin's; I think it was Monday. He did not want me to give them up to Dobson. I understood him that he had a written demand from Dobson; I think he said it was in writing. I delivered the blocks to defendant, Martin."

Cross-examined—"Got the blocks from the steward of the *Ecliptic*; McKay and he had some talk, and handed out the blocks from the booby hatch: the blocks were never in possession of defendant McKay. Capt. Lorway and Capt. of *Putnam* were in Mr. Martin's office when I delivered the blocks

to Mr. Martin. * * * I met Mr. Robinson in Martin's office when I went for the blocks."

The defendant McKay says :—"I went to Johnson as constable to go and take the goods. I have never had at any time the blocks in question in my possession. I never received any notice from Mr. Dobson, or any one else, demanding the blocks from me. I had no conversation with plaintiff on the Monday after blocks were taken. I might have got a letter from Mr. McKay, and forgot it. There was no letter delivered me by Mr. Dobson. I think I was in Martin's office once about the blocks. I won't say what day it was, but within two or three days after, the day I sent the telegram to Johnson to bring up the blocks. This was the only day I was in Martin's office about the blocks. I received some letter from Mr. McKay about the blocks. I won't say the one in evidence is a copy. I don't recollect being in Martin's office when note produced was served on us and we reading it together; I might have, but don't think."

On this point the defendant Martin says :—"The reason I did not give up the blocks was that I considered it would have been a breach of trust to give them up to any one but Robinson; plaintiff did not to my recollection say at any time he would swear to the blocks; they were not taken out of my possession till got for the Court."

It appears, therefore, from the concurrent testimony of all the witnesses examined on the point that the blocks in question never were in the actual possession or under the personal control or disposition of McKay; certainly not from the time they were delivered to Martin by the constable under McKay's direction. The property, as we have seen, was delivered to Martin by Johnston, on the 7th or 8th of September, and continued in his possession, detained by him for and on account of Robinson and as the agent of the latter, till replevied on the 8th October.

The plaintiff says that when he served the written demand upon Martin on the 6th October, McKay was present, and that they read it together; they said they would not give up the blocks; Martin was the spokesman, and Robinson left after service of notice.

"Martin again admitted he had the blocks then; when the writ was served upon him he said 'we will see.' McKay and he consulted and Martin refused to give up the blocks." It is not necessary further to refer to this last piece of testimony as it clearly refers to something that occurred after the writ in the cause issued. In these conversations Martin was on both occasions the "spokesman." McKay said nothing. The notice was served on Martin and by him were the replies given which were pressed upon the Court as evidence of McKay's possession of and control over this property at the time of action brought. The only point left to the jury by the learned Judge was the identity of the property replevied. He assumed property in plaintiff to have been proved and directed the jury to find for him if they found the property replevied to be the same given to Martin by Johnston.

I do not think this direction can be sustained: first, because there is in my opinion no evidence of a detention by McKay at the commencement of this suit; secondly, because if there be evidence of such detention by McKay, it was contradictory and inferential only, and ought to have been submitted to the jury and their opinion taken upon it. I am therefore of opinion that the rule *nisi* for a new trial should be made absolute with costs.

IN RE STEEL COMPANY OF CANADA (LIMITED.)

Before McDONALD, C. J., and McDONALD, SMITH, WEATHERBE, RIGBY and THOMPSON, J J.

(Decided January 7th 1884.)

*Companies Winding-up Act.—Application to rescind Winding-up Order.—
Necessity to move Judge first.—Affidavit as to information and belief
(before the Judicature Act.)—Statement of Judge.*

BEFORE an application is made to the court to rescind an order of a Judge, application should be made to the Judge who granted the order and the court will require positive proof that such application has been made. Affidavit of information and belief and statement of the Judge in court held not sufficient.

On the 29th November, A. D. 1883, James B. Greenshields and George Moffatt of London, England, Alexander Patterson

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and James A. Gillispie of Montreal, in the Province of Quebec, and James J. Greenshields of London, England, all merchants, co-partners, doing business together as such in the city of Montreal, under the name and firm of Gillispie, Moffatt & Co., presented a petition in the Supreme Court in which they represented that the Steel Company of Canada Limited, a company incorporated in England under the Companies Acts, 1862 and 1867, and having one of its chief places of business at Londonderry, in the County of Colchester, in the Province of Nova Scotia, was insolvent and unable to pay its debts as they became due, and moreover that the said company had otherwise acknowledged its insolvency.

That the petitioners were creditors of the said company, in a sum exceeding two hundred dollars, to wit: in the sum of \$71,860.45, and interest on \$13,116.09, from the thirty-first day of October last.

That the said sum of \$13,116 was the amount of a certain promissory note over-due and unpaid by the said company to the petitioners, and of which payment had been refused after presentment.

That the said company had acknowledged its inability to pay the amount of the note, and had neglected to secure or compound for the same to the satisfaction of the petitioners, although thereto often requested, and had further notified the petitioners that they would be unable to meet payment of certain other notes as they respectively matured, and had further neglected to secure or compound for the same to the satisfaction of the petitioners, although thereto often requested.

That the said company owned large properties and effects in the Province of Nova Scotia and had other assets in the Dominion of Canada, and that it was in the interest of the petitioners and Canadian creditors of the said company that the said company should be placed under the operation of the Statute of Canada, 45 Victoria, Chapter 23, and the assets and property thereof in Canada liquidated under the provision of the said Acts.

The petition concluded with a prayer that by virtue of the provisions of the Statutes of Canada, 45 Victoria,

chap. 23, an order entitled a "winding up order," do issue ordering that the business of the said Company be wound up, and that after such notice to the contributories, creditors, shareholders and members of the said company as might be prescribed by the Court, a liquidator of the estate and effects of the said company may be appointed.

And that in the meantime Philip S. Ross, accountant, of the city of Montreal, be appointed Provincial Liquidator thereof. The whole with costs.

Sedgewick, Q.C., who appeared as counsel for and on behalf of the Steel Company of Canada, limited, on their behalf consented to the granting of a winding up order.

Henry, Q.C., appeared on behalf of the Merchants' Bank of Halifax, a creditor of the company for upwards of one hundred thousand dollars, and opposed the granting of the order applied for.

Mr. Justice RIGBY, to whom the application was made, having heard counsel on both sides, adjourned the motion until the 1st day of December, on which day he delivered judgment as follows:—

The first question for my consideration is the right of the Merchants' Bank of Halifax, as a creditor of the company, to intervene for the purpose of contending that the winding up order applied for should not be granted. Section 15 of the Act under which the application is made is confined to cases where the application to the Court is opposed by the company only. The provision of section 17 can only be urged, it seems to me, by a creditor as against the company, and in favor of the application, after the making of the report of the person ordered to enquire into the affairs of the company. Section 24 provides for a previous notice to creditors, but that is merely so that they may have an opportunity of suggesting who the liquidator shall be. I hold, accordingly, that the creditors have no right to intervene for the purpose of opposing the granting of the order applied for; but, notwithstanding this, I should be glad to get any assistance from parties interested for the purpose of showing me that I have no jurisdiction. I therefore listened with attention to, and weighed deliberately,

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the arguments of the counsel for the bank for the purpose of showing that because this was a foreign company the Dominion Act did not apply. And this is really the only question for me to consider. Now this is nothing more nor less than an Insolvent Act, expressly declared to be such, though, of course, it contains certain peculiar provisions in consequence of its relating solely to incorporated companies. Now nobody would pretend that the Legislature of the Dominion of Canada has not the right to pass laws in relation to insolvency, and if the contention of the bank were to prevail that this Act does not apply to foreign incorporated companies, then the power of the Dominion Parliament to legislate in relation to that branch of the subject would be taken away. In *Story's Conflict of Laws*, 7th edition, p. 515, the principle is laid down in regard to the effect of bankrupt proceedings in foreign countries, as decided in *Selkrig v. Davies*, 2 Rose Bank. Cases, 291, 314. The author says :—" This is now accordingly the settled law of England." I confess I had some difficulty in consequence of provisions in the Canadian Act for the extinguishment of the company, and there are possibly some provisions of the Act which it may not be practicable to carry into effect in a foreign country. Such provisions may be *ultra vires*, but, after all, I cannot see how that argument can have greater weight as applied to an incorporated company than it would have if applied to an individual. A British subject is as much a foreigner as a British incorporated company. Let us suppose that a British subject comes here and carries on business, having his principal assets and place of business here. He may have carried on business altogether through an agent, or may have come here personally and remained a short time and then have returned home. Suppose that such a person becomes insolvent in Nova Scotia, is unable to meet his obligations, and an application is made to put him into bankruptcy. Suppose some one says you cannot do so because he is a British subject, and it is urged as against the Canadian Act that there are English bankrupt laws applicable to the case, and that the property of the bankrupt should be distributed according to those laws. In such a case the principle I have quoted from *Story* intervenes and says that

the English law recognizes, and the law of every country recognizes the assignment made in the country where the insolvent has been declared bankrupt, as vesting in the assignee the English property, and making it necessary for the English creditors to file their claims with the assignee and subject themselves to the Canadian laws. The Canadian law in reference to insolvent corporations does nothing more than this, if a company becomes insolvent its operation ceases, and the act vests its property in the liquidator or assignee, including, it may be, property in England. If there are unpaid calls among the assets of the company I cannot see why the liquidator cannot go to England and sue for them. And I cannot see, in that view, that there is any difference between an incorporated company and an individual. When a business man becomes bankrupt it may be said that he is extinct as a business man, and when a trading corporation ceases to be capable of performing the only functions for which it exists, it would be to some extent obliterated under these circumstances. I cannot find that the insolvent company is exempt from the operation of the Canadian Act, either by express words or by implication. If the act were not applicable to foreign incorporated companies, all that a company would have to do would be to organize itself and become incorporated in England, and, though doing all its business and having all its property and creditors *and its principal place of business* in Canada, the Canadian law would be inoperative. For these reasons I am led to the conclusion that I have jurisdiction to grant the winding up order applied for, and provisionally to appoint a liquidator.

The learned Judge thereupon granted the following order:—

Upon hearing the petition of the above-named petitioners, who are creditors of the above-named company, and which petition was addressed to the Honorable the Chief Justice of Nova Scotia or any of the Judges of said Court, and was presented to me on the twenty-ninth day of November now last past in the new Court House at Halifax, at 11 o'clock a. m., and on reading the affidavit verifying the same and the

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notice thereto annexed, and upon hearing Robert Sedgewick, Q. C., who then appeared as counsel for and on behalf of the said The Steel Company of Canada limited, and on their behalf consented to the granting of a winding up order herein;

And on motion of counsel for said petitioners said motion having been by me adjourned until this day,—

I do order that the said The Steel Company of Canada, limited, be wound up by this Court under the provisions of chapter 23 of the Acts of Canada, passed in the year one thousand eight hundred and eighty-two, entitled an Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies and Trading Corporations, and the Acts in amendment thereof.

And I do further order that the costs upon and incident to the said application and this order shall be paid by the liquidator out of the assets of said company, and I do hereby, pursuant to said statute, appoint James Bain Duffus, of the City of Halifax, merchant, Provisional Liquidator of said company.

His Lordship also granted an order appointing and defining the powers of a Provisional Liquidator.

A rule *nisi* was subsequently obtained by the Merchants' Bank of Halifax, on affidavit to set aside the winding up order and all proceedings thereon, on the following grounds:

1. Because the act chapter 23, of the Statutes of Canada, 18-2, is not applicable to the said The Steel Company of Canada, limited, the said company being a company incorporated in England and not incorporated in Canada, and being therefore not within the purview of the said act.

2. Because upon the true construction of the said Act the same cannot be held to apply to a company incorporated under the provisions of imperial or foreign legislation and not incorporated in any part of Canada.

3. Because the said act being a winding up act applies only to companies having a corporate existence subject to the legislative jurisdiction of the Parliament of Canada, and the corporate powers and functions of the said The Steel Company of Canada cannot be annulled by the Parliament of Canada.

4. Because if upon the true construction of the said act it is applicable to the said The Steel Company of Canada, the said act is *ultra vires* of the Parliament of Canada.

5. Because it is not competent for any Judge or any Court in this country to dissolve a corporate body created either by the Imperial Parliament or by a competent foreign authority.

6. Because no Parliament in Canada, nor any Court or Judge in Canada, has any jurisdiction over the shareholders or contributors of the said The Steel Company of Canada.

7. Because at most the only jurisdiction which the Parliament of Canada could by virtue of its legislative authority as regards bankruptcy or insolvency, give to the Courts of this Dominion in reference to the said The Steel Company of Canada, would be as regards the assets of the corporation as such, which do not at all include the liability of shareholders as contributories, the latter matter being a matter existing independently of the condition of insolvency.

8. Because it was not shown in the said petition or otherwise to the Judge who granted the said order, that the management of the said The Steel Company of Canada was under the control of persons in Canada.

9. Because no fact was shown by the said petition or otherwise establishing as to the said The Steel Company of Canada the existence of any of the conditions which would justify the granting of the said order.

10. Because no fact was shown by the petition or otherwise which went to establish that the said The Steel Company of Canada had in any way admitted its alleged insolvency.

11. Because the said winding up order is irregular and invalid, inasmuch as it could not be validly made without appointing a liquidator, and no such liquidator could be legally appointed except after previous notice to the creditors, contributories, shareholders or members of the said The Steel Company of Canada, and no such notice was given.

12. Because no winding up order can be legally made under the said act without previous notice to the creditors, contributories, shareholders and members of the company

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sought to be wound up in a manner and form prescribed or to be prescribed by the Court.

13 Because even if under the said act the learned Judge who granted the said order had power to grant it, he should have refused it, as the said The Steel Company of Canada cannot be effectually wound up in Canada.

The affidavit of the cashier of the bank, upon which this order was obtained, set out the indebtedness of the company, and the fact that, before the application by petition above referred to, an action had been commenced at the suit of the bank against the company, and writs of attachment issued under which a large amount of the property of the company had been attached. The affidavit also contained a clause as follows :—

On Saturday, the eighth day of December, instant, Mr. Hugh McD. Henry, acting as counsel for the said The Merchants' Bank of Halifax, applied, as I am informed and verily believe on affidavits sworn to in that behalf by me to the said Mr. Justice Rigby, for leave to appeal from the said orders so granted by the said Mr. Justice Rigby as aforesaid, but the said applications for appeals from the said orders were refused by the said Judge.

The rule was argued December 18th, 1883.

Sedgewick, Q. C., took a preliminary objection that Henry, Q. C., had no *locus standi*.

Henry, Q. C., in support of rule.—The Steel Company is within the definition of a trading company in the act. Nearly all the provisions of the Act have in view the dissolution or winding up of the company. No company short of an incorporated body comes within the meaning of section 19 of the act. Subsequent sections show an intention to legislate in reference to bodies over which the Parliament of Canada has a legislative power. It was not the intention to deal with companies except such as are created by the Dominion or Local Legislatures. We admit, for the sake of argument, that the company may be put in bankruptcy here, but not that it can be wound up. As to jurisdiction of Court cites *Lindley on Partnerships*, 1485, (Appendix 1.)

The company is liable to be sued in our courts because it is allowed to do business in the country on condition of becoming subject to our laws. The English Act differs from ours. The English Companies Act of 1862 has a list corresponding to section 1 of our Act, showing the extent of its applicability. Where the English Courts have wound up companies incorporated abroad, it is solely on the ground that the individuals composing the company have come within its jurisdiction to wind up companies not incorporated. We can pass an act to prevent companies doing business here unless they become incorporated here. A company differs in this respect from an individual, as a foreign company has only an artificial life outside of the country in which it does business. The most that could be done would be to pass an act vesting the assets of a foreign company doing business here which committed an act of bankruptcy in an assignee and enable him to realize the assets and pay a dividend to the creditors. *Lindley on Partnership*, p. 1233, says: "It is not competent to any court in this country (England) to dissolve a corporate body created by a competent foreign authority." The order granted by the Court can mean nothing else than the final extinction of the corporate powers of the company. It is very doubtful whether a foreign company can be wound up under the Companies Act of 1882. Practically, it would be impossible to do so; *Lindley*, p. 1486. (WEATHERBE, J.—Suppose four people enter into a partnership agreement in England to do business in Halifax, and, while living in England, incur debts here, and a judgment is recorded against them, which is collected from one of the parties in England.) In that case the Chancery Court here would not have power to settle the matter as between the parties, first, because they are not domiciled here; and next, because there is no statutory provision to give the Court jurisdiction. It seems that the order here being such as the Court would make to wind up a Canadian company, was more than the Court had power to make; *L. R.*, 3 P. C., App. 764. It is not shown that the management of the company exists here. The control of the company affairs is in England. The most that is shown is that one of the principal places of business of the company is in Canada. In

The Society for the Propagation of the Gospel v. New Haven, 8 Wheaton, 463, the decision was on the ground that the legislature of one country has no power to dissolve a corporation created by the legislature of another. There is a distinction between bankruptcy jurisdiction and jurisdiction to wind up a company; *9 Beav.*, 469. The jurisdiction of the Parliament of Canada extends only to bankruptcy. It can deal with the assets of the company, but it has no power to wind up the company, or over the liability of individuals to contribute. The individual members of the company are not subject to the jurisdiction of the Court because they have never come in here. (RIGBY, J.—It appears to me, then, that all that amounts to is this, that you can get at the assets but not at the individuals.) The liability of members of a company is not an asset of the company and will not pass to the assignee. When a corporation does business it involves nothing but the liability of the corporation as such. The individual members are unknown, as far as transactions of the corporation are concerned; *Lindley*, p. 4. The debt of the company is not the debt of the individual. If the Parliament of Canada has the power to convert a debt owing by a company doing business here into debts owing by a number of individuals residing in England, it has the same power over the property and civil rights of the people living in England as the Imperial Parliament, which is absurd. (THOMPSON, J.—The Dominion Parliament has power over the same class of subjects) It is not to be assumed that they intend to legislate to affect a class of persons over whom they have no jurisdiction. Section 199 of the Companies Act of 1862, shows the authority under which unregistered companies and partnerships have been wound up in England. They are wound up, not as companies, but as partnerships, included under the term “unregistered companies,” the members of which have, in some way, made themselves liable to be wound up under the Act. A case which illustrates this perfectly is *re Commercial Bank of India*, L. R., 6 Eq., 517. (WEATHERBE, J.—The term “winding up” is applied to foreign companies as far as it can apply.) *Lindley* says, p. 1232, that a foreign company cannot be wound up, but if it

is registered the corporate body created by that registration may be wound up. A foreign corporation registered under the English act acquires all the incidents of an English corporation. A company may be wound up in England, so far as it exists there, by virtue of registration, leaving the foreign entity intact; *Re General Credit Co.*, L. R., 5 Ch. App., 363; *Princess of Reuss v. Boss*, L. R., 5 H. L., 576. In the case of *Union Bank of Calcutta*, 3 DeG. & Sm., 253, the bank was incorporated in India, and the Court assumed that they had jurisdiction to wind it up on a breach of the partnership articles executed in London. The order in the present case is not in compliance with the act. It is irregular and premature. The liquidator to be appointed under sections 24 and 30 is the final and not the provisional liquidator. The liquidator is to be appointed in the winding up order. The proper course is to appoint a provisional liquidator then to give the notice to creditors required, and then to appoint the liquidator in the winding up order. It is not enough that the company consents. Creditors have a right to the report in section 17. See generally sections 13 to 18 and 24 to 30. In England it is held that resort to the Winding-up acts is a measure that a creditor can only have after notice. It is only reasonable that creditors should have a notice of an act that forces them to accept a compromise for their claims. If creditors are heard in reference to proceedings under the English acts, it is reasonable to suppose, in a case of doubtful construction, that there was an intention that they should be heard on proceedings under the Dominion Act,—which is largely copied from the English acts,—before a winding up order is made; *Wordsworth on Joint Stock Companies*, 167, 209, 218. As to right to be heard cites *L. R.*, 5 Chan. Div., 600; *L. R.*, 10 Chan. Div., 130.

Sedgewick, Q. C., contra.—No application can be made to this Court to rescind a judge's order until after an application to the judge. The Merchants' Bank has no *locus standi* here to oppose the petition; 9 *L. T.*, N. S., 654. Under section 18 of the act only a creditor can apply for a winding up order. Notice of the petition has only to be given to the company, and only four days before the application is heard by the

Court. The Court may make the order at once, or may adjourn the hearing to a subsequent day. There is no record of any application to the judge who granted the rule to rescind it. (*Henry, Q. C.*—The judge stated it when the argument commenced, and there is an affidavit of Mr. Duncan.) Mr. Duncan merely swears that he is informed and believes that an application was made. The statement of the judge is not evidence. (*SMITH, J.*—If it is, the judge may supply evidence at any time. *MCDONALD, J.*—He may make a statement as to what took place at the trial.) That is different, he cannot supply evidence. The first question is whether the act applies to foreign companies. The legislature must have so intended. The object of the act is to gather in and distribute the assets of companies and, as incidental to that, to prevent fraudulent preferences. Our local Act, chap. 32, Acts of 1879, is limited in its operation to companies incorporated by the local legislature. The Dominion Act applies to incorporated trading and manufacturing companies, without any qualification. Section 3 defines what is meant by "insurance companies." There is no limitation to companies incorporated in Canada. Section 13 refers to effecting service upon companies who have "no head office in Canada." (*WEATHERBE, J.*—That might apply to a case like the Windsor and Annapolis Railway, which is incorporated here but has its head office in London.) Section 106 refers to cases where the head office is in Canada. Sections 108, 109, 114, and 116 incorporate the Consolidated Insurance Act of 1877 in this Act; *Acts 1877, Chap. 42*. A trader residing abroad might be made subject to the Insolvent Act of 1875. The intention of the legislature was to extend the same principles to foreign incorporated companies. The contributories can be summoned to appear in this Court and a judgment may be obtained against them. The fact of the company being a foreign corporation would be no answer to an action for calls. When the calls are settled the contributories can be sued in England; *6 H. & N.*, 410, 415. The winding up of a company has no relation to its dissolution. Our Legislature has not said that the company shall be dissolved. All they wanted was to get hold of the assets of the company and

divide them. (WEATHERBE, J.—It seems that the most that can be said against the act is that it is insufficient, and not what it might be made by amendment.) There would be the same difficulty in winding up foreign companies registered in England that there would be in winding up a foreign company under our Act; *Morowitz on Corporations*, section 610; *Westlake's Private International Law*, sections 123, 124; *Ibid*, sections, 120, 121, 122; *Royal Bank of Scotland v. Cuthbert*, 1 Rose, 462; *Fourth Marine Ins. Co.*, 9 Beav., 69; *Story's Conflict of Laws*, section 320; 2 *Johns. & Hem.*, 318.

Ritchie, Q. C.—The Court must look at every portion of the act to construe it. The procedure under the act is plain. As to winding up under English Act cites sections 82, 83 and 84 of *Companies Act of 1862*. There is no provision for notice to creditors of the presenting of the first petition. The notice is given of the application for the order, which cannot be given in the first instance. The only ground in the petition that can be relied on is the acknowledgment of insolvency by the company, of which there was no other evidence than the statement made by Mr. Sedgewick. If Mr. Sedgewick had any authority it must have been by resolution, which should have been shown. Such an admission cannot be made to affect the rights of third parties. The whole scope of the Canadian Act is a winding up of and putting the company out of existence and collecting calls from contributories. There is no clause, as in the English Act, under which there can be a collection of assets and a partial winding up. The affidavit of the cashier of the bank of a fact of which he is "informed and believes" is evidence, unless denied; *Chitty's Arch. Prac.*, 1620; *Maden v. Hater*, 3 Jur., 769.

(*Henry, Q. C.*, applied for leave to make an affidavit on terms, if necessary, showing that the application was made to the Judge to rescind his rule, and refused by him.)

THOMPSON, J., (January 7th, 1884,) delivered the judgment of the Court:—

This was an application to make absolute a rule *nisi* to rescind an order of Mr. Justice Rigby for the winding up of

the Company. It was opposed on the ground, among others, that there was no evidence that Mr. Justice Rigby had been applied to for a rescission of the winding up order before the rule *nisi* was taken from the Court. The counsel who argued in support of the rule *nisi* being made absolute did not contend that such a previous application to Mr. Justice Rigby was unnecessary, but they urged that there was ample evidence of such application. The evidence, they said, was to be had in the statement of the learned Judge himself, who was on the bench at the commencement of the present argument, and who intimated that the application had been made to him. If evidence was necessary, I think it should have been made to appear in the regular way, by affidavit, so that the fact would be on the record, and open to contestation by the other side as to the sufficiency, in point of time or otherwise, of the application. So it was decided in *Goren v. Tute*, 7 M. & W., 141. The necessity for evidence of the previous application arose in that case from a different reason from that in this case, viz : from apparent delay, the excuse being a previous application at Chambers, but the necessity existed, and the case is in point because "GURNEY B., being present in court," as Mr. Justice RIGBY was here, "stated that the application had been made to him as above mentioned," (*i.e.*, in due time,) "and *Humphrey*, in support of the rule, contended that the presence of the learned Judge in court, certifying the fact, was sufficient, and likened it to the case of a Judge's order, which it never was necessary to verify by affidavit," but PARKE B. held that the objection must prevail and that the cause of the apparent delay ought to have been explained by affidavit. ALDERSON B. added: "The court can know nothing of what had passed at Chambers, but by affidavit. The case of a Judge's order is different; there the order, when produced, speaks for itself; but parties have no right to tax the memory of the Judge as to every case brought before him at Chambers."

The effect of this case is not lessened by *Thomas v. Evans*, 9 M. & W., 829, which turned on a different point, viz : the absence of any necessity for the application to the Judge being made to appear.

I may add that the intimation given by Mr. Justice RIGBY, if it could be treated as evidence, gave us no information as to

time or circumstance, but merely indicated that application for an appeal had been made to him before the rule *nisi* was taken.

Then there is an affidavit of D. H. Duncan, stating that he is informed and verily believes that Mr. Henry made the application to the learned Judge. There are no doubt many cases where an allegation of "information and belief" is sufficient, as where probable cause only has to be shown, or where the allegation relates to the effect of facts already distinctly stated, or where it relates to something done or left undone, or about to be done by the other party, who can, in reply, furnish the direct evidence, or where it relates to something done or left undone, or about to be done by a third party, but I do not see how it can be treated as evidence of a fact of which the direct evidence is in the possession of the party making the allegation, and as proof of what that party, or his counsel has done. See *Joynes v. Collinson*, 13 M. & W., 558; *Classey v. Drayton*, 6 M. & W., 17; *Green v. Rohen*, 6 Dowl., 659; *Noad et al. v. Provincial Insurance Co.*, 2 Prac. Rep., Ont., 382.

The necessity for the application to Mr. Justice RIGBY was, as I have said, not controverted. The order sought to be rescinded was, as respects the party now moving, *ex parte* and application to rescind should be made to the Judge before being made to the court. It does not appear that the order complained of in *Thomas v. Evans*, above cited, was an *ex parte* order—it was probably an order which the party appealing had already contested before the Judge and which he therefore did not need ask the Judge to rescind. Otherwise the practice stated in *Cesarini v. Ranzani*, 4 Jur., N. S., 813; *Warman v. Halihan*, L. J., Q. B., 48 and 6 Jur., N. S., 1301; *Mitchell v. Harding*, 5 L. T., N. S., 348, and *Day v. Vincent*, 12 W. R., 281, and 9 L. T., N. S., 654, would probably have prevailed. The application to the Judge was especially necessary in view of our practice with regard to appeals from a Judge, which is to be followed unless the Judge has refused an appeal as in *Re Cameron's Circus*, 2 R. & G., 248, and in view of the provisions of sec. 79 of chap. 23 Dom. Acts of 1882. I think therefore that this rule *nisi* should be discharged, but

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that leave should be given the appellants to move again, if such leave will avail them ; and while feeling some regret that a matter of such importance should turn on a technicality I am authorized by my brethren to add that if the matter can be reheard at once, by any arrangement between the parties or otherwise, the court will be prepared in a day or two to deliver judgment on the main questions which were before discussed on this motion.

TORY v. THE MUNICIPALITY OF GUYSBORO.

Before McDONALD, C.J., and SMITH, WEATHERBE, RIGBY and THOMPSON, JJ.

(Decided January 7th, 1834.)

Submission.—Conflicting provisions as to costs.—Discretion of arbitrators.

THE parties entered into a submission by which they referred all the matters in difference, &c., &c., and provided that the costs of the cause and of the reference, or in any matter relative thereto, should be in the discretion of the arbitrators : and further, that judgment should be entered upon such award for the amount thereof, and of the costs of suit and reference in the same manner as if the verdict of a jury had passed. The arbitrators made an award in favor of defendant, but said nothing as to the costs.

Held, that the award must be set aside.

Per RIGBY, J., that the cause should be re-submitted to the arbitrators.

MCDONALD, C. J., dissenting, held that, although the provisions of the submission as to costs were in apparent conflict, the intention was that in the event of the arbitrators not exercising their discretion as to the costs, they should follow the award as provided in the latter clause of the submission.

Plaintiff having brought an action against defendants on a contract for the construction of a bridge in the Municipality of Guysboro, an agreement was entered into by and between the parties to the cause, their counsel and attorneys, whereby all matters of difference between the said parties were referred to two arbitrators who were empowered to chose a third arbitrator "so as they the said arbitrators, or any two of them, shall make and publish their award in writing, of and concerning the matters in question on or before the first day of September next, or within such further time as they the said arbitrators, or any two of them, shall by writing indorsed on this rule appoint, and that the said parties shall and do perform, fulfil and keep such award, so to be made by

the said arbitrators, or any two of them so named as aforesaid, and that the costs of this cause and of such reference or in any matter relative thereto, shall be in the discretion of said arbitrators, and that the said arbitrators shall have all the powers of amendment of a judge at *nisi prius*. And it is also hereby agreed that this submission may at any time be made a rule of court upon the application of either party, and that judgment shall be entered upon such award for the amount thereof and of the costs of suit and reference in the same manner as if the verdict of a jury had passed in this cause."

The arbitrators proceeded with the reference and made the following award :—" After hearing the said parties, the plaintiff and defendants, and their respective witnesses relative to and touching all the matters in dispute herein, and after duly weighing and considering the allegations and evidence of said plaintiff and said defendants and their respective witnesses of and concerning the matters in difference as aforesaid between said parties herein, we do make and publish this our award of and concerning the premises, that is to say ; that the said plaintiff had no cause of action herein against said defendants, and that there is nothing due from said defendants to said plaintiff, and also that said defendants receive nothing for their set-off pleaded herein against said plaintiff."

A rule was obtained on the part of the plaintiff to set aside the award so made on the following among other grounds :—

1st. Because by the submission of said cause to arbitration and the award of the arbitrators under said submission, it appears that all the questions and issues under said submission have not been decided by said arbitrators.

2nd. Because by said submission the arbitrators had the disposal of the costs of the cause and of the said reference and any matter relative thereto, the same being in the discretion of said arbitrators, and by the award of said arbitrators herein under said submission the costs of the cause or of said reference were not decided by and disposed of by said arbitrators, and the award is therefore not final or certain or conclusive and is bad.

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Weston in support of rule.—Unless an award extend to all matters submitted to the arbitrators it is utterly void. If several distinct matters are referred and the arbitrator omit to decide upon any one of such matters, the whole award is vitated; *Redman's Law of Awards*, 118; *Randall v. Randall*, 7 East., 81; *Robson v. Railston*, 1 B & Ad., 723. If the arbitrator is to direct how the costs are to be paid the award will be bad if he omits to do so; *Redman on Awards*, 119; *Richardson v. Worsley*, 5 Exch., 612; *Smith v. Wilson*, 2 Exch., 327; *Williams v. Williams*, 9 Exch., 90.

McCoy, Q.C., contra.—The assent of the parties to a reference cannot take a cause out of court without an order of the court, and where a cause is referred by order of the court, even though the parties consent, the reference comes within the class of compulsory references under the statute. In *5 H. & N.*, 831, though there was consent and the Judge merely completed the order by adding terms to the rule the reference was held a compulsory reference under the statute. (RIGBY, J.—The Judge altered the rule against the will of the parties, which altered the whole case. Have we power to send the cause back to the arbitrators?) Yes. That was fully argued in the case of *Tremaine et al. v. Mackintosh et al.*, *Ritchie's Equity Decisions*, 447. The court has power under the statute to refer a cause back to the arbitrators especially where there is anything in the rule likely to mislead. If the award is referred back it can only be on the point as to costs. The award is good as far as it goes; *Redman on Awards*, pp. 121, 139, 141, 142.

Henry, Q.C., in reply. (RIGBY, J.—The clause in our statute in reference to the power of the court to send cases back is exactly the same as the clause of the English Act, which has been held to enable the court to send the cause back at any time; *6 El. & Bl.*, 383.) That, I presume, settles the power of the court to send the cause back.

RIGBY, J., (January 7th, 1884,) delivered judgment as follows:—

The submission in this case provided "that the costs of this cause and of such reference, or in any matter relative

thereto, shall be in the discretion of said arbitrators," and we are of opinion that the award must be set aside because it contains no adjudication upon such costs. It was so held in the case of *Richardson v. Worsley*, 5 Ex., 613, in which the submission contained a similar clause, and there was an award of a lump sum, but nothing said as to costs; and in *Williams v. Wilson*, 9 Ex., 90, PARKE B. referring to such a clause in the submission then before the court said, "We do not think the award can be made good on the ground that the matter is left to the discretion of the arbitrator in the sense that he may award upon this question or not as he thinks fit. We think it clear that it was intended that he should exercise his discretion on the question of the costs; not whether he would award upon that question or not at his option or discretion." It has also been held that when the submission is silent as to the costs of reference, neither leaving them to the discretion of the arbitrator nor to abide the event, neither party would be entitled to them; *Bell v. Postlethwaite*, 5 El. & Bl., 695; *Taylor v. Lady Gordon*, 9 Bing., 570; *Grove v. Cox*, 1 Taunt., 165. We do not think that the latter words of the submission by which it is provided that "judgment shall be entered upon such award for the amount thereof, and of the costs of suit and reference in the same manner as if a verdict of a jury had passed in this cause," affects the question before us. They are not intended to qualify the preceding language which fixes the authority of the arbitrators but merely provide for the mode of enforcing the award after it has been made, including the arbitrator's adjudication upon the costs. I would be disposed myself to re-submit this matter to the arbitrators, so that the controversy might be finally determined by the tribunal chosen by the litigants, but as a majority of the court are of opinion that this is not a case for the exercise of such a discretion, the rule to set aside the award will be made absolute with costs.

SMITH and THOMPSON, JJ., concur.

WEATHERBE, J., I granted the rule *nisi* at Antigonish and I then thought the only ground was that which has now prevailed.

MCDONALD, C. J.—The award in this case finally determined the matters in difference between the parties submitted to the arbitrators and is attacked on one ground only,—that the arbitrators did not award as to costs, which, by the submission, were left in their discretion. The submission refers the “cause and all matters in difference therein” and that “the costs, etc., etc., shall be in the discretion of the arbitrators,” and then continues, “judgment shall be entered upon such award for the amount thereof and of the costs of suit and reference in the same manner as if the verdict of a jury had passed in the cause.” These clauses are contradictory in their terms, but we are bound, I think, so to construe the whole submission as to give effect to all its requirements and sustain the award made under it, if we can do so consistently with the rules of construction applicable to other written agreements. It will not be denied that under the latter clause of the submission above quoted, if that clause stood alone, it would be competent for the defendant to tax the costs and enter up judgment on the award; and I think it competent for him to do so in this case. It is not usual to insert both these clauses in the rule or agreement of submission, because, I suppose, of their apparent inconsistency; but we are not at liberty to assume that it was done here heedlessly and without purpose. The only purpose I can imagine for the course pursued, and it is, I think, a reasonable one, is, *the intention of the parties* to provide for the payment of the costs to the successful party, should the arbitrators fail to exercise the discretion confided in them. It was not necessary to provide for entering judgment on the award if the costs should be disposed of by the arbitrators; and had the arbitrators, as they might have done, directed each party to pay his own costs, it would be impossible to enter up judgment “for the amount of the award and the costs of the suit and reference,” as provided in the submission, because that would be inconsistent with the award. I therefore think it a reasonable and fair construction of this submission to hold that it was the intention of the parties to provide for the case that has actually occurred here, namely, the omission of the arbitrators to exercise their discretion as to the costs, and

that these costs should therefore follow the award as provided in the latter clause of the submission.

In my opinion, therefore, the award is good and should be sustained, and the rule discharged with costs.

MCLEARN v. LYTLE

Before McDONALD, C.J., and SMITH, WEATHERBE, RIGBY and THOMPSON, JJ.

(Decided January 7th, 1884.)

Revisor.—Nul Tiel Record.—Variance.—Record Roll.—Omission of declaration from Record Roll.

THE omission of the declaration from a record roll which set forth the issue of the writ of summons, the names of the parties, the particulars of claim, the plea of confession, &c., held not to be such a fatal irregularity as would sustain the plea of *nul tiel record*, or prevent the admission in evidence of the roll,

Held, further that a variance between the date of the judgment as alleged and as it appeared on the record was not fatal, as this latter objection was not taken at the trial.

This was a suit to revive a judgment for the sum of one hundred and one dollars and seventy-one cents recovered by plaintiff against defendant on the nineteenth day of November, A.D. 1866. The defendant pleaded *nul tiel record* and payment. The cause was tried by SMITH, J., at Windsor, in September, 1883, when the Prothonotary for the County of Hants, who was called as a witness on behalf of the plaintiff, produced a paper which he stated was received by him as such prothonotary, as a record roll in the cause of *McLearn v. Lytle*, and placed on file 23rd April, 1873.

The paper produced recited that on the twenty-sixth day of October, 1866, John McLearn sued out a writ of summons against William Lytle, with particulars annexed as stated showing a balance due plaintiff of \$81.91 on which plaintiff claimed interest.

The paper then proceeded as follows:—And the said William Lytle, on the seventeenth day of November, 1866, confessed the said suit and consented that judgment should be entered up against him the said William Lytle for the sum of \$81.91, besides costs of suit. Therefore, it is considered that the said John McLearn do recover against the said

William Lytle \$81.91 aforesaid; and the further sum of \$19.80 for costs of suit.

A motion was made for non-suit which the learned Judge declined to grant, upon which the defendant submitted to a verdict against him with leave to move to set the same aside. A rule was taken to set the verdict aside and for a new trial on the following among other grounds:—

Because of the improper reception of evidence.

Because there was no record of the judgment sought to be revived, proved or put in evidence.

Because the paper put in, and purporting to be such record, was no sufficient record of said judgment.

Because the said alleged record was not signed by any officer of the Court, and was signed only by the plaintiff's Attorney.

Because the said alleged record was no record of the proceedings in the suit upon which the alleged judgment, sought to be revived, was founded, as it set out no writ in the said cause.

Because there was no bill of costs proved in the said suit.

Because only a portion of the papers, upon which the said alleged judgment was founded, was proved or put in evidence.

Drysdale in support of rule.—There is a fatal variance even supposing the record proved to be a good one. The writ alleges a judgment recovered on the 19th November, 1866, while the record is of a judgment recovered on the 17th November, 1866. The record is bad not being in the form of the statute. The declaration is not set out. It has been held, where everything else was right, that the mention of a wrong term was fatal; *1 H. Bl.*, 49; *Pleadings and Practice Act*, Schedule 11, chap. 94 R. S., sec. 68,—Schedule 11 applies only to judgments by default. In the statutory form the date is treated as important. If an informal paper like this is to be treated as a record there is nothing to prevent a party who has brought a suit on a promissory note suing again on the same note. The only defence would be a former recovery and the record would not show it. (RIGBY, J.—You could give parol proof.) I doubt my right to do so. (MCDONALD, C. J.—The record here is in exact consonance with that in *McDonald v. Ferguson*, 1 R. & G., 70.)

Weeks contra.—This is not the mode of taking advantage of the defect if there be one. The proper course would have been to move to set aside the record, or there should have been a motion for non-suit on the trial, stating the ground, when the party producing the record would have had leave to amend; *Chitty's Arch. Forms*, 194; *Nul Tiel Record* does not deny the sufficiency of the record. Nothing material is omitted from the record. What is of importance is the particulars which we have. (McDONALD, C.J.—My opinion is that the only authority for such a record is *McDonald v. Fergusson*, 1 R. & G., 70. WEATHERBE J.—I think the record in that case must have been on a judgment by default.) As to power to amend a record cites *Chitty's Arch. Prac.*, 362. (THOMPSON, J.—When a variance appears you never heard of the court amending the piece of evidence which shows the variance. A record may be amended but not when it is offered in evidence. The defendant has denied that there is a record of a judgment of that date, and I don't see any other way in which he could have done it. Even if you amended, the question would be how was it when the plea was pleaded.) The variance complained of is not a variance but the omission of a date. (RIGBY, J.—It seems to me that the question is one of amendment of the declaration. I agree that the record could not be amended.)

Drysdale.—The law cited by the learned counsel all refers to the *nisi prius* record which is made up before trial. The case of *McDonald v. Fergusson* was one of strict default. The Judge has a general authority, but he might as well amend a deed or a promissory note as the record put in evidence. *Chesley v. Bonnett*, 1 R. & C., 112, is authority that the record is the only evidence of the judgment, and where a record is the foundation of an action everything must be strictly proved. In *Hardy v. Smith*, 1 R. & G., 353, there was a plea of *nul tiel record* and a motion to amend.

THOMPSON, J., (January 7th,) 1884, delivered judgment as follows:—

On 17th November, 1866, the plaintiff appears to have recovered, by confession, the judgment which he seeks in this

suit to have revived. On 23rd April, 1883, the record roll put in evidence was fyled. The writ of revivor issued the day following. The admissibility and sufficiency of the roll are attacked because it does not contain the declaration, but instead thereof recites the issue of the writ of summons on a certain day, gives the names of the parties and the particulars of the plaintiff's claim. Inasmuch as this paper does recite these particulars and then proceeds to state the defendant's plea of confession and his consent that judgment be entered against him for \$81.91 besides costs of suit and proceeds to declare the recovery, (in the regular way,) of the sum of \$81.91 for debt and \$19.80 for costs of suit, we think that notwithstanding the irregularity occasioned by the omission of the declaration the roll was properly received in evidence and is sufficient evidence of the judgment to enable the plaintiff to recover in this suit. The irregularity could doubtless have been taken advantage of in another way; we are only at present called on to decide that it is not sufficient to sustain the plea of *nul tiel record* or the contention of defendant's counsel that there was no record in evidence. The point taken at the argument as to a variance cannot avail the defendant as it was not taken at the trial when an amendment of the declaration might have been made to meet it.

MCDONALD, C.J.—The verdict in this case is attacked for the alleged improper reception of evidence by the learned Judge on the trial. The evidence complained of was a paper purporting to be a record duly filed in the cause. The Prothonotary of the court proved that the paper had been filed by him as the record in the cause on the 23rd April, 1883, and he produced it from the files of the court as such record. I do not think a Judge on the trial of a cause can be expected to verify by comparison with the pleadings on file, the correctness of a roll tendered in evidence as a record, and which is proved to have been duly filed as such. In this cause the writ was issued on the 24th April, the day after the record objected to was filed, and the defendant put its validity in issue by plea of "*nul tiel record*." Finding a record duly filed it was the defendant's duty, if the paper was not a correct roll

of the proceedings in the cause, to apply to the court or a Judge for such amendment as the practice of the court will permit. Having elected to go to trial with the knowledge that a defective record was filed, he cannot be allowed to treat it as a nullity, or to object to its sufficiency when tendered in evidence on the trial. The point in *Grant v. Murdoch*, Thomson's N. S. Rep., 100, was not like the present. There the learned Judge at the trial, rejected the paper tendered—because it had been filed by the party offering it in evidence only half an hour before it was so tendered, and such a paper could not be considered “duly filed as a record.” The court held the ruling to be right. The judgment of Mr. Justice BLISS in that case gives a concise and clear summary of the law and practice in our courts relating to records at the time that judgment was delivered, and, with the exception of the alteration made by the first edition of the Revised Statutes, dispensing with the certificate of the Prothonotary, the law and practice of this court are in my opinion the same now as then; see also *Jost v. Church Wardens of St. Georges*, 1 R. & C., 451. As to the power of amendment Mr. Justice BLISS says: “If through mistake or inadvertence an erroneous record should be filed, a party who would be prejudiced thereby could examine it and if necessary apply to the court for redress.” Whether the paper complained of would, on such application, be held to be a sufficient record roll, it is not necessary for me to say. The rule for a new trial must be discharged with costs.

WEATHERBE, J.—I understand that we are all agreed that the record was bad and the only question is whether the defect was an irregularity or a nullity. If it was a nullity I understand that the decision would have been the other way. I think there is some doubt as to whether it was an irregularity or a nullity, but we had no argument on the point, and as a majority have agreed I do not wish the judgment delayed.

RIGBY, J.—I agree with the judgment read by my brother THOMPSON. I do not think it necessary to decide whether the record was good or bad. Not being a nullity I think it was properly received in evidence.

SMITH v. SMITH.

Before McDONALD, C. J., and SMITH, WEATHERS, RIGBY, and THOMPSON, J.J.

(Decided January 7th, 1884.)

Over-holding process.—Service of the affidavit with the notice.—Waiver of irregularity.

THE affidavit on which the application was intended to be made was served separately from the notice although both were served in due time. The statute had the words "with the notice,"

Held by McDONALD, C. J., and THOMPSON, J., that the service need not be concurrent as "with" meant "also."

Held by WEATHERS, RIGBY and THOMPSON, J.J., that the irregularity, if any, was waived by the defendant reading an affidavit in answer to the one so served.

This was a proceeding under Acts of 1880, chap. 2, sec. 43, to recover possession of premises alleged to be overheld by the defendant, who went into possession as tenant of the plaintiff. The section proceeded under reads as follows:—

"When any tenant shall, after the expiration or other determination of his tenancy, refuse to deliver up possession of the premises to the landlord, or to the person entitled to the immediate possession of the premises, such landlord or person so entitled to the immediate possession, or his agent or attorney, may apply to the Judge of the County Court in the district where the premises are situate, and, having made oath that such tenant has held and occupied the premises designated in the affidavit for a certain period then expired, and that due notice to quit, when necessary, has been given, such Judge shall issue a summons in the form in Schedule A., giving at least fourteen days' notice, to be served with a copy of the affidavit on the tenant, or by leaving the same with some adult person of the household living in his dwelling house, to show cause why he holds over," etc.

Plaintiff having made affidavit as required, obtained a summons calling upon defendant to appear before J. W. JOHNSTONE, Esq., County Court Judge, to show cause why he should not deliver up the described premises. The summons so obtained having been discharged, on motion of Counsel for defendant, plaintiff, on the same affidavit, applied for and obtained a second summons calling upon defendant to appear

and show cause on a subsequent day. The second summons was served on defendant, but no further affidavit was served. Subsequently, it having been made to appear by affidavit that there were disputed facts between the parties, the learned Judge made an order for the hearing of the parties and their witnesses *viva voce*. From this order defendant appealed, on the ground, among others, that no copy of the affidavit on which the second summons or order issued was served upon him as required by law fourteen days before moving to make said order absolute.

McCoy, Q. C., in support of appeal.—The Judge set aside the summons on which plaintiff made his first application, and a second application was made on a fresh summons. The Judge having decided the matter on the first application, had no power to entertain a second. The second summons was served on the 12th June, requiring the defendant to appear on the 19th. This would not give sufficient time. The second summons was not served with a copy of the affidavit on which it was granted. The second summons was obtained on the same affidavit as the first. A copy of the affidavit was served with the first summons but not with the second.

Longley, contra.—The rule and affidavit need not be served together. It is sufficient if fourteen days notice is given. There was no second affidavit, the second summons being obtained on the first affidavit. The defendant made an affidavit that the affidavit was not served, which was met by an affidavit that it was served, and the Judge decided to go on. The defendant went into the merits by reading affidavits to show a dispute upon which the Judge made the order appealed from. (WEATHERBE, J.—Is there anything to show that the same affidavit was used twice?) No. The vital question is, whether the affidavit required by law was served more than fourteen days previous to the hearing. My affidavit establishes the fact that this was done, and it is uncontradicted. When the first order was set aside the Judge allowed a second to be taken on the spot, as a matter of course. (RIGBY, J.—The defendant knew that the second summons was granted on the same affidavit. It seems to me

the question turns on the point whether the statute requires the two papers to be served simultaneously. THOMPSON, J.—There is a further question, whether it affects the jurisdiction of the Court or is a mere irregularity.) If the defendant wished to appeal he should not have gone into the merits.

McCoy, Q. C.—The objection was taken before the Judge. The object of the affidavit is to give notice of the grounds of defence. If the Judge had no jurisdiction, consent would not give it to him. Unless the affidavit is served fourteen days previously with the summons, the Court has no jurisdiction to proceed in the cause. The authority is statutable and must be strictly pursued.

THOMPSON, J., (January 7th, 1884,) delivered judgment as follows:—

The only point relied on in support of this appeal is that a copy of the affidavit on which the summons issued was not served *with* the summons. In point of fact, it was served some time before the summons, and along with a previous summons for the same complaint, which had been dismissed. The defendant, (appellant), had therefore ample notice, as regards time, although it was still open to him to contend that the statute peremptorily requires service of both documents to be made together, in order that a defendant may know what it is that the summons is based on, and what he has to answer. The statute is peculiar; sec. 43, cap 2, *N. S. Acts of 1880*, and I have no doubt that the summons and affidavit should be served together, but the main questions are whether the separate service is an irregularity only, or makes both services nullities, and, if an irregularity, whether it has been waived. In *Holmes v. Russell*, 9 Dowl., at p. 489, COLERIDGE, J. says:—"It is difficult sometimes to distinguish between an irregularity and a nullity; but I think the safest rule to determine what is an irregularity and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity, if he cannot, it is a nullity." When a doubt exists as to whether a defect makes the proceedings irregular or null, the rule is that they are to be treated as irregular only. I have

no doubt that the separate service was a defect which could be waived, as indeed almost any defect in service of a summons can,—or indeed the want of a summons, as for instance, by the defendant appearing and answering the affidavit, which he claimed had never been served on him for his reply, as required by the statute, and it is equally plain that the appellant did waive the defect in this very way. Although he claimed the benefit of the irregularity when he appeared before the Judge below, he read affidavits in reply to the one irregularly served.

I think, therefore, that the appeal must be dismissed.

MCDONALD, C. J.—In my opinion the words of the statute in reference to the service do not mean a concurrent service.

WEATHERBE, J.—I do not think it necessary to decide that point. I think the defect, if any, was waived.

RIGBY, J.—I agree with my brother WEATHERBE, that it is not necessary to decide as to the meaning of the words of the statute in reference to the service. I also agree that the service was waived.

PARSONS, ASSIGNEE v. MACLEAN.

Before McDONALD, C.J., and McDONALD, RIGBY, and THOMPSON, JJ.

(Decided January, 14th, 1884.)

Action by assignee.—Notice under statute.—Special promise to assignee in consideration of forbearance.

DEFENDANT was indebted to plaintiff's assignor, and, upon demand of the amount by the assignee, acknowledged the indebtedness and requested time for payment, promising, in consideration of the forbearance, to pay the amount to plaintiff. Plaintiff suing for the debt, objection was taken that he was obliged as assignee to give fourteen days' notice under the statute.

Held, that the forbearance to sue was good consideration and that plaintiff could recover on an account stated.

This was an action brought by plaintiff as assignee of the estate and effects of James S. Macdonald to recover the sum of \$3,391.91, being the amount of principal and interest due on two promissory notes made by the defendant in favor of the plaintiff's assignor. The principal ground relied upon by

defendant was that the notes in suit were held by plaintiff under and by virtue of a deed of assignment from McDonald and that "plaintiff did not, fourteen days before the commencement of the action, serve upon the defendant, or leave at his last place of abode, a notice in writing signed by the plaintiff his agent or attorney, stating the right of the plaintiff or specifying his demand under the said deed of assignment, pursuant to the statute in such case made and provided."

At the trial of the cause which took place before Rigby, J., at Halifax, April 26th, 1883, the plaintiff gave evidence as follows:—Saw defendant after I was appointed assignee, the day after. It was on Wednesday, think November 15th, 1882. (Assignment admitted and put in and read.) He came to my office (Eaton & Parsons); the assignment was then in my possession and the copy put on file in the registry. It was between 8 and 9 o'clock in the evening that defendant came in. He spoke about his indebtedness to to James S. McDonald & Co., about the notes, and said he owed them (the notes) fast enough. I had the notes in question then under my hand. Held no other notes than those declared upon. He then promised to pay me and asked me to give him a little time, and not press immediately for payment and not let anybody know. I said I would give him reasonable time and I thought we could make arrangements so that the note might be considered cash. Spoke of keeping it secret and giving time. He mentioned that there were two notes; that one was for \$2,540, and the other \$700, in all \$3,240. I looked at the notes and told him they amounted to more than that, that he had forgotten the interest. He said—O yes, I forgot the interest. Either then or at a subsequent conversation, he said the interest would bring them up to \$3,300, but I said it would I thought be nearer \$3,400, and either he or I said the interest could afterwards be calculated to date of payment, to which the other assented. After that he said addressing me, "I will pay you." Both conversations were before action brought. * * The following Saturday afternoon, after the Wednesday referred to, in consequence of having heard that defendant

had left the Bank I went to his house and saw him ; spoke of his indebtedness to me and asked for payment. He said he could not pay me then, but would very shortly. He said he wished to see Mr. Bremner before he could do anything. Had no other dealings with defendant, except in relation to these notes.

Cross-examined.—My claim in this suit arises solely from my being assignee of estate of Jas. S. Macdonald & Co. Previous to the assignment he owed me nothing. I was only conversing with defendant as assignee of Jas. S. Macdonald & Co. He said at the first conversation that he wanted me to give him a few days. I gave him to understand that I would not sue him then and there. It was proposed that the two notes should be given up and he would give me the notes of friends which I should get cashed, and thus it would not be known that he had been borrowing money from Jas. S. Macdonald & Co.

Judgment was given for plaintiff and a rule taken to set the same aside as against law and evidence.

Sedgewick, Q.C. and Bell, in support of rule.—The declaration merely alleges a debt from defendant to McDonald and an assignment from the latter to plaintiff, without alleging anything further or any notice under the statute. There must be an account actually due to support an account stated ; *6 H. & N.*, 655. It must be admitted that plaintiff cannot recover except upon an account stated, and it is essential to this that there should be a debt due and payable at the time. (MCDONALD, J.—There may be an account stated of a debt to become due at a future time upon which a suit could be commenced after the lapse of the time.) If the plaintiff could not sue before the fourteen days the account stated will not enable him to sue earlier ; *1 Wms. Saund.*, 210 ; *Petch v. Lyon*, 9 Q. B., 147 ; *Tucker v. Barrow*, 7 B. & C., 623. The cases last cited show that there must be a subsisting recoverable debt to support account stated. Plaintiff cannot sue within the fourteen days in his own name without fresh consideration ; *Tibbits v. George*, 5 A. & E., 115. (RIGBY, J.—The only question is whether there was a consideration for defendant's

promise. I think the existing debt was a consideration.) The only promise here was a promise to pay a debt which defendant was already bound to pay, which cannot support a promise; *Leake on Contracts*, 619. There is nothing proved here further than that defendant owed McDonald who assigned to plaintiff and that defendant promised to pay plaintiff. That is not an account stated; there must be something further, such as a going over the accounts; 4 *B. & C.*, 163; 4 *M. & W.*, 32; 3 *B. & C.*, 591; 7 *A. & E.*, 19.

Sedgewick, Q. C.—Plaintiff occupies, in respect to defendant, the same position as the holder, being an endorser of a promissory note, if the maker promises to pay him. He cannot sue before the note is due. Plaintiff here cannot sue within the fourteen days except on a new contract on a new consideration. In *Jones v. Ryder*, 4 *M. & W.*, 34, the evidence was held insufficient to establish an account stated although the evidence was stronger than in this case. There was nothing in anything that McLean said to waive his right to the fourteen days.

Eaton mentioned the previous decision; (*Parsons v. Maclean*, 3 *R. & G.*, 405), on which the court said they did not wish to hear him.

MCDONALD, C. J.—The court are all of opinion that the verdict must be sustained and the rule discharged. I have no doubt that the debt was available to the assignee in equity and in law, and that the forbearance to sue, as proved, justified the verdict, and that there was good consideration for the promise in the account stated.

MCDONALD, J.—I was not on the Bench when the previous decision was given, and as it was a decision of the full court I should not stand out against it even if I held a contrary opinion. My own opinion is, however, that the decision was right.

Rule discharged.

IN RE STEEL COMPANY OF CANADA (LIMITED.)

Before McDONALD, C. J., and SMITH, WEATHERS, RIGBY and THOMPSON, J J.

(Decided January 28th, 1884.)

Winding-up order.—Jurisdiction over foreign companies.—Requisites of order.

Held, by SMITH, WEATHERS, RIGBY and THOMPSON, J J., that a company, though incorporated in Great Britain, can be made the subject of a winding-up order in the Supreme Court of Nova Scotia, under the Winding-up Act of 1882, (Canada,) when the company is carrying on business in Nova Scotia, and has its management here altogether or in part.

Per McDONALD, J.—The Court has jurisdiction to make such an order when an act of the Provincial Legislature has conferred on the company the right to hold lands in Nova Scotia.

McDONALD, C. J., dissenting on the ground that the winding-up act does not and could not confer jurisdiction over foreign companies.

Held, by McDONALD, C. J., and McDONALD, SMITH, and WEATHERS, J J., that a winding-up order must name the permanent liquidator, and could, therefore, only be made after notice to creditors, contributories, &c.

RIGBY and THOMPSON, J J., dissenting.

Henry, Q. C., (January 19th, 1884,) moved on fresh affidavits to set aside the winding up order and all proceedings thereon, his previous application (*ante*, p. 17) having been dismissed. All the points involved having been argued on the previous hearing, no further argument was considered necessary.

THOMPSON, J., now, (January 28th, 1884,) delivered judgment as follows :—

It appears to me that there is no ground for questioning the power of the Parliament of Canada to pass the Winding up Act of 1882, even supposing that the Act may have been intended to apply to foreign companies. The subjects dealt with in it are immediately connected with "trade and commerce," and with "bankruptcy and insolvency," and I take it that in dealing with such subjects Parliament is not to be considered as having exceeded its powers because it undertakes to deal with the rights, and control, to some extent, the proceedings of a class of persons some of whom are abroad. The act is not wider in its scope, in that respect, than the winding up provisions of the British Act; and I presume that, in dealing with the subjects assigned to it, the Canadian Parliament has powers as great as that of the United King-

dom, where there is no controlling imperial legislation on the same matter, and where the exclusive powers of the Provincial Parliament are not transgressed. It is not asserted that in this instance either of the two elements just named occurs; but, it is said that because Canada is a colony and has received her power to legislate from the Imperial Parliament, these powers can only be exercised in relation to persons and rights within her own territory. In this doctrine I am not able to concur. When we come, however, to deal with the construction of the Act, to consider whether Parliament intended, in passing it, that it should be applied to foreign companies like the Steel Company of Canada, which is organized in England under the Imperial "Companies Act of 1862," far greater difficulties seem to arise. We find that the Act contains a number of provisions which it will be impossible to carry out against a foreign company, but which seem to have been intended to be set in operation against every company that may be in process of being wound up under it. For example: section 19 is intended to prevent the company from carrying on business after the winding up has commenced, except in so far as the liquidator may think beneficial for winding-up purposes. This, we must be asked to hold, applies to a company having its head office in England and carrying on business there. The same section restricts transfers of shares after the winding-up order; therefore, the holders of these shares in Great Britain are to be prevented from making transfers. Contributories and creditors are to be consulted at every important step in the winding-up proceedings, although thousands of miles away from the country. Under section 38 the powers of the directors are to be cut off by the winding-up proceedings, although the Board is sitting in another country to do that which the law of that country requires them to do. Section 44 shows that the complete winding up of the company is intended, although by the law of the country which created it,—in this case a statute of the Imperial Parliament,—its organization remains intact, and its powers undiminished. In settling the list of contributories the rights of persons who are far beyond the jurisdiction of the Court, and who can only get evidence here at enormous

expense to themselves, are to be adjudicated on and settled. The liquidator must get authority to go into foreign courts to compel payment by contributories and is expected to be able to prove in foreign countries against the estates of foreign contributories whatever may be the provisions of the bankruptcy or insolvency laws of such countries. If he should not be able to acquire such powers the rights of creditors must be sacrificed because such foreign contributories will escape contribution. Foreign contributories may be called on to pay money into our court. The claims of creditors are to be admitted, adjusted, compromised and otherwise dealt with in a manner which will alter their common law rights and, regardless, in several particulars, of the general law of their own and of the company's country. Creditors in the foreign country are to be restrained from suing the company, and must ask leave of the Court here before they can even sue there. In the case of a bank the provisions for notice to holders of notes are strangely inadequate, if a foreign bank is to be wound up. If a foreign insurance company is to be wound up policy holders all over the world are to be summoned to come in and claim for unpaid premiums, and, while this new class of claims is created, in contemplation of the policies being no longer in force, no protection is or can be given to the property of the company outside of the jurisdiction from seizure, to answer to a loss which may occur under any of the policies. The franchises conferred by the government or parliament of another country, or the people of such country, are to be limited and eventually destroyed. These and other difficulties of a similar character cannot be got over by the theory that such provisions were enacted with a view to domestic companies and were not intended to be applied to foreign corporations. If foreign companies are within the act all these provisions must be considered as having been ineffectually aimed at such organizations, and the proceedings in liquidation in such cases will only lead to confusion and mischief if such provisions are not carried out. They would present, to my mind, insuperable obstacles against adopting the view that Parliament intended this act to apply to foreign companies, if it were not for the fact that

the same difficulties exist in England in applying the winding up provisions of the English Companies Act of 1862 to a foreign company, and yet, by a succession of decisions, the English Courts have held that these provisions do apply to foreign companies, provided such companies carry on business in England, or have their management there. The provisions which suggest these difficulties are there worked out, as nearly as may be, in all such cases, or are left not worked out at all, according to the exigencies of the case that may be in hand.

I yield my opinion of what the true construction of such enactments is, to the authority of these decisions, and am forced to conclude that if an English Court were sitting here and administering this act, this company would be wound up here, as its principal works are in Nova Scotia, and its management partly here. Of course I have not arrived at this conclusion without considering what are the points of difference between the words in the two acts, which declare what organizations shall come within their provisions. The Canadian Act is declared to apply, *inter alia*, to "incorporated trading companies;" the Imperial Act is declared to apply, *inter alia*, to "any partnership, association, or company." Leaving out of sight, for a moment, its foreign character, the Steel Company of Canada is an incorporated trading company, and in England would be a "company." Then we have to ascertain whether the foreign character and origin would make it, in the eye of an English Court, any the less a "company;"—in other words, whether a foreign corporation is, in England, wound up as being a "a company," or whether it is treated merely as a partnership or association. If such a corporation is wound up there as a "company," we should wind up this organization as an "incorporated company," which is the phrase in our Act; if, on the other hand, it is wound up there as an association, or partnership, then there are no words in our Act to fit the case. I think that there is no ground for supposing that when a foreign corporation does business in England, or sues, or is sued there, it is ever treated as a partnership or association. The latter term means, in English law, nothing more than the former, but it is evidently

used in reference to those bodies of numerous and changing members, under the management of directors, which have for many years figured in British commerce and industrial enterprise, sometimes known as joint stock companies, sometimes organized under the Letters Patent Act, sometimes having authority to sue in the name of some particular officer or officers, but not being corporations. These associations, under the common law, are treated as mere partnerships; in commerce they are regarded differently from partnerships, and, in the Scottish law, which followed the Roman, Dutch and French mercantile usages, had some recognition, although not as corporations, as being bodies standing midway between corporations and partnerships. In no proceeding in the English Courts, in which a foreign corporation is involved, can I find that it is treated as a mere partnership, or "association," (in the partnership sense of the word.) In saying this I do not wish it to be supposed that I am stating, as my impression, that a foreign corporation has, in England, all the rights, of a domestic corporation. The comity of nations recognizes the right of the foreign corporation to sue those who have contracted with it as such or who have invaded its rights, and renders it liable to be sued by those who have complaints against it. The foreign corporation is only a *quasi* corporation, "composed of and representing under the corporate name, the same natural persons," as C. J. TANEY said in *Ohio, &c., R. R. Co. v. Wheeler*, 1 Black., 286. The distinction may not be a very practical one, but it is all that I can see to have been well established. On the other hand there is much to refute the idea that the foreign corporation is treated as a mere partnership. The right to sue in the corporate name is inconsistent with this theory, so is the liability to be sued in the corporate character, and, more than all, the administration of the foreign law concerning the corporation in the winding up proceedings as between the contributories. See *Dutch W. I. Co. v. Van Moses*, 1 Str., 612; *Henriques v. Dutch W. I. Co.*, 2 Lord Raymond, 1532; *National Bank v. DeBernalles*, R. & M., 190; *Alivon v. Furnival*, 1 C. M. & R., 277, at page 295; *Melan v. Duke de St. James*, 1 Bos. & 2 Pull, 138; *Steam Navigation Co. v.*

Guillon, 11 M. & W., 877. In one case in England, (*Bulkeley v. Schutz*, 8 Moore, P. C., N. S., 170,) an attempt had been made to compel a foreign partnership to register as a company in England, and Lord Justice JAMES said "that the Act never contemplated that a foreign partnership actually complete and existing in a foreign country, could be brought within the purview of an English Act of Parliament, the English Legislature having no power over the shareholders of such a company;" but, in view of the facts of that case, and of subsequent decisions, that language cannot be strained to apply to the winding up power over foreign companies, or as qualifying the doctrines which prevail in the English Courts with respect to foreign corporations, irrespective of the Companies Act provisions. It evidently referred only to the fact that the registration in England of foreigners for the purposes of acquiring a corporate character there, while they remained and intended to remain outside of the jurisdiction, was not contemplated under the clauses of the act with regard to registration, and that the act was not intended to confer such benefits on foreigners, or to compel foreigners to avail themselves of its provisions. Cases, on the other hand, are not wanting to show that a foreign company may be sued and enjoined, even though it has not come within the jurisdiction of the Court, or had any business or management within the jurisdiction. Such are *The Carron Iron Co. v. McLaren*, 5 H. L., 416, and *Westman v. Aktiebolaget, &c.*, 1 Ex. Div., 237. The passage cited from *Lindley on Partnership*, at page 1269 of 3rd. ed., seems to me to sustain the view which I have taken, although cited for the opposite contention. He says: "The writer apprehends that it is not competent for any court in this country to dissolve a corporate body created by a competent foreign authority, and a foreign corporation, therefore, cannot be wholly wound up and dissolved in this country." The emphasis in this passage, to show its true meaning, should, I think, be laid on the words *dissolve* and *wholly*, for I read the passage as indicating that while such an organization can undoubtedly be wound up in England, the provision for its total extinguishment may be ineffectual. The same, perhaps, may be said of the other provisions, which,

as I have said, create such difficulty as regards the application of the Act. To give the passage any other reading would be to assume that the eminent author was unacquainted with the cases in which foreign companies have been wound up. If he had intended to express an opinion contrary to these decisions he would at least have referred to them.

As regards the procedure which was adopted here, I entertain no doubt that it was the proper, and the only proper procedure. The initiatory proceedings in winding up are essentially different from those under the English Act and rules, although there are expressions in the statute which seem to read as though no such difference was intended to exist. We cannot, however, to suit such phrases, assume that proceedings which are provided for in the English act and rules are applicable here, or supply their omission by our decision. The language of the act is confused, but it appears to me that the order of procedure is this: When a creditor claims that a company should be wound up, he gives the company four days' notice of his application for a winding up order, and, at the expiration of the four days, presents his petition for such order to the Court. There is no provision for notice to creditors, &c., at this stage, as there is in England, by statute and rules, and there is no room for implying that such notice was intended,—unless, indeed, the intention was that a rule of Court might make provision for such notice, and as there is no rule, we are not to consider that view,—for the company itself is to have but four days' notice, and the Court may at that stage have no means of knowing who or where the creditors, contributories and members are. The Court is then to make the order, or refuse it, or to institute further enquiry, after which the order is to be made or refused. The making of the order is the first adjudication. It is that which determines the status of winding up, and until such an order is made there are no other proceedings contemplated or provided for, excepting the enquiry as to whether it should be made or not. The winding up order determines the status of winding up, like an attachment did in the case of a trader, under the Insolvent Act. Until it is made, it appears to me that no one can tell whether the company is to be wound up

or not, and, therefore, there is no authority for any liquidator to act, and there is no custodian for the property. It is contended, in effect, against the validity of this order, that after the Court has decided that a winding up order should be made, it is to hold its hand; a *hiatus* is to occur—an interregnum, during which the winding up is not to go on, and in which, (as a necessary consequence, it seems to me,) there can be no one to take charge of the property, and during which the directors and officers of the company can do as they please in the disposition of the assets and of the accounts. It is said that that interregnum is for the purpose of giving notice to creditors, contributories, &c, to meet and confer with reference to the nomination of a liquidator. The awkwardness and danger of such an interregnum, it is said, are obviated by section 29, which provides that if at any time there be no liquidator, all the property of the company shall be deemed to be in the custody of the Court. But this surely means “any time after the liquidator has been appointed.” It is intended to provide for vacancies occurring in the office of liquidator. It cannot mean, for instance, that the property is to be deemed to be in the custody of the Court before the decision that the company is to be wound up; why then should it be supposed to mean that the Court is to have the custody before the winding up order is made? The order, as I have said, seems to be the basis and groundwork of all the winding up proceedings, and is so in England. But the contention which I have referred to is based on the confused language of section 24. The preceding sections authorized, as I have said, the making of a winding up order after four days’ notice to the company. Then section 24 says: “The winding up order must appoint a liquidator, or more than one liquidator,” * * * “but no such liquidators shall be appointed unless a previous notice be given to the creditors, contributories, shareholders and members in the manner and form prescribed by the Court.” The word “must” is peculiar to this Act, but I do not think it means anything more than “shall,” which is so often interpreted “may,” especially in matters of procedure. I take this section to mean that when the Court has decided that a winding up order shall be made

the liquidator, (*i. e.*, the permanent liquidator,) shall (*in ordinary course*,) be appointed in the winding up order, but that such, (*i. e.*, the permanent) liquidator shall not be so appointed if the creditors, &c., have not had notice; and, inasmuch as no provision has been made for previous notice, either by the Act or Rules of Court, (such as have been made in England, and such as the Court has power to make here,) the liquidator, (*i. e.*, the permanent liquidator,) could not have been appointed in this winding up order. What then was to be done? The counsel against the order say that although the Judge had decided that the order should be made, he was to stay his hand and not sign such order until the creditors, contributories, &c., throughout Great Britain and America were convened to nominate a liquidator. I think my brother RIGBY rightly made the order, when he decided that this was a proper case for an order; that he properly refrained from appointing a permanent liquidator in the order, because the creditors, &c., had not had, and could not have had notice; and that in the meantime he was right in using the power given by section 30, which says: "The Court may at any time after the presentation of the petition and before the first appointment of a liquidator, appoint provisionally a liquidator of the estate and effects of the company." I cannot see how it can reasonably be contended that the order is bad because the provisional liquidator's appointment is in it. Section 24 certainly cannot be read as prohibiting the appointment of a provisional liquidator in the winding up order, because, if so, it is in conflict unreasonably with section 30, and, as I have already intimated, the words of section 24, "the winding up order must appoint a liquidator," can only mean "the winding up order shall, when the creditors, &c., have had notice, and when practicable, appoint a liquidator." This construction enables the winding up order to be made when the adjudication takes place that the case is a proper one for such an order. It enables the status of winding up to be fixed immediately on such adjudication taking place, stops all transactions prejudicial to the creditors and contributories, which might go on if the order was not actually made, and enables a provisional liquidator to take charge while the

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creditors, contributories, shareholders and members are being convened.

My opinion is, therefore, that the rule to set aside the proceedings should be discharged.

RIGBY, J.—It was contended at the argument of the motion to set aside the winding up order, that the court had no jurisdiction to make such an order in relation to a foreign incorporated company. It was admitted that the Dominion Parliament had power to pass an insolvent law applicable to such a company, but that this act was not intended to be such, as the companies subject to its provisions became virtually extinct, and it contained other provisions in reference to the organization and management of the companies to which it was intended to apply, which the Dominion Parliament had no power to enact in relation to companies incorporated out of Canada. If this argument is to prevail it becomes obvious that neither would the legislation apply to corporations created by the several local legislatures for the Dominion Parliament, outside of its jurisdiction over "Bankruptcy and Insolvency," has as little power to legislate concerning the transfer of shares and the other matters in sec. 19 of the Act—the power of the directors (sec. 38)—the making of calls, &c., of provincial corporations, as they have in relation to companies incorporated by the British Parliament. And if we confine the operations of this act to Canadian corporations, even including those incorporated by the several provinces, we must assume that Parliament intended to place home corporations at such a disadvantage, as against foreign corporations, as to make it advantageous for capitalists who might contemplate incorporation for the purpose of doing business in Canada to obtain their charters abroad. It seems to me that the legislature have been careful to show their intention of legislating only in reference to "Bankruptcy and Insolvency" when passing this Act. By its title it is confined to insolvent companies, and the object of its provisions is undoubtedly to realize the assets of such companies and equitably distribute them among the creditors. Sec. 9 sets forth the circumstances under which a company is

to be deemed insolvent, and sections 13, *et seq.* enact the procedure for obtaining a winding up order only when such insolvency has taken place. In these respects the act differs from the English "Companies Act, 1862," from which some of its provisions have been taken ; as the latter act provides for the winding up of a company, not only when it shall become unable to pay its debts, but also whenever it shall have passed a special resolution for the purpose ; when it shall not have commenced business within a year, or shall have suspended business for such period ; when the members shall have become reduced below seven, and whenever the court shall be of opinion that it is just and equitable that the company should be wound up. It may be that each of the many provisions of the Canadian act is not applicable to each of the companies to which the act, as a whole, was intended to apply ; but that could hardly be otherwise in a general act intended to have reference to a great variety of institutions. But it does not follow, because some of its provisions are inapplicable to a particular company, that therefore the rest of the act is to be held inapplicable. And in the case of some corporations to which the act might apply it may be that it would be inexpedient to bring the act into operation, and the court would refuse to grant the winding-up order as has been done in the English courts upon a like ground ; (see in the matter of the *Union Bank of Calcutta*, 3 De. G. & Sm., 253.) Besides the fact that the act is not in express terms confined to Canadian companies, which it seems to me it would have been if it was intended so to confine it—the legislature admittedly having power to pass an insolvent law that would apply to other companies,—I am of opinion that the language of portions of the Act declares that it was not intended so to confine it. Sec. 13 provides for service of notice of the winding-up petition when there shall be "no head office in Canada," by service in the province where its chief place of business shall be situate. We are told, however, that a Canadian company may have its head office out of Canada, but it seems to me much more unlikely that the legislature should provide for such an exceptional case than that it should omit expressly to limit the act to Canadian companies

if such was the intention. Again sections 106 to 119 inclusive are declared to apply only to Life Assurance Companies, and, by sec. 107, it is provided that notwithstanding the provisions of the statutes in that behalf respecting insurance, any deposit held by the Receiver-General for policy holders and any assets vested in trustees pursuant to such statutes, are to be applied and distributed under that act among the persons entitled to claim thereon according to their rights established by such statutes. One of the statutes so referred to and which is expressly named in sec. 108 is "The Consolidated Insurance Act, 1877," (Cap. 42, 40 Vic.) which unquestionably applies to foreign as well as to home companies; (see sub-sec. 2 of sec. 7—sec. 16, &c) But we are also told, in answer to this argument, that the act under which the winding-up order was made only applies to Canadian Life Assurance Companies and not to foreign Assurance Companies, which latter still remain subject only to the statutes respecting insurance. I can only repeat that it seems to be less likely that the legislature should have failed to express such intention than that it should not have limited the act of 1883 to Canadian companies if that act was only intended to apply to them; especially as the proposed construction would leave such assets of foreign Assurance Companies as should happen to be within the jurisdiction of our legislatures, other than those which the insurance statutes require shall be deposited with the Receiver-General or held in trust for policy-holders, subject to attachment at the suit of any creditor who might chose to sue out process, and who thus, or by voluntary transfer or payment by the company, which under sections 71 *et seq.* of the Act of 1873, would be fraudulent in the case of Canadian companies, might obtain a preference as against the other creditors of the company. I do not think it could have been the intention to leave this act open to such a construction. It would not be singular, considering the grounds upon which an application to wind up a company under the English Act may be based, and in which that act differs so essentially from the Canadian Act as already pointed out, to find the English courts holding that the former act was not applicable to foreign companies; for it might well be said that the

British Parliament having declared that a company under that act might be wound up when the number of its members had become less than seven, or when it had not commenced, or had ceased to carry on business for a year, must have had reference to provisions of the English law applicable to British corporations only. Yet in the case of *The Commercial Bank of India*, L. R., 6 Eq., 517, "a joint stock company formed in India and incorporated by registration under Indian law, and having its principal place of business in India with an agent and a branch office in England," Lord ROMILLY held that he had jurisdiction to make the winding-up order asked for. It was contended, however, at the argument, that that company was not wound up as a foreign corporation, but as a partnership or unincorporated association, and under the general words in section 199 of "The Companies Act, 1862," "any partnership, association or company," and which, it was said, had a wider signification than the words in our act which designated the companies to which it was applicable. I do not see what ground there is for the contention that that company was not wound up in its corporate capacity. Neither the report nor any of the treatises say so, and the proceedings were in its corporate name. Suits are being continually instituted in England against foreign corporations, as such. ERLE, C.J., in *Branley v. S. Eastern Railway Company*, 12 C. B. N. S., 63, said:—"A foreign company has a *locus standi* here; and so, no doubt, has an English company in a foreign country," p. 70, and in Lord Justice LINDLEY's work on *Partnership*, 4th edition, p. 1485, the learned author says:—"The jurisdiction of the courts of one country over companies domiciled in another country appears * * * to depend upon whether these companies are, through their property or their agents, amenable to the process of the courts in which the companies are sued. Assuming a foreign company to be amenable to the process of our courts there is nothing to prevent its being sued or even adjudicated bankrupt here, if it could be so adjudicated were it an English company." The argument in favor of the jurisdiction in the present case is strengthened by the fact that our federal legislature, by the insurance statutes to which reference has

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already been had, has recognized the capacity of foreign insurance companies to carry on business in Canada; and I cannot see why the words, "incorporated trading company," in section 1 of our act are not at least as capable of a construction that will include this corporation as those referred to in the English act to include the Commercial Bank of India.

The petition for the winding-up order states that this company has one of its chief places of business and owns large property and effects in Canada. These facts in my opinion would be in themselves sufficient to give this court jurisdiction over the company, but we have also the additional fact which, I think, removes the question from the region of doubt, that our local legislature by chap. 111 of the Acts of 1875 gave this corporation power to hold real estate in this province to the value of \$1,000,000, to expropriate lands contiguous to that then owned or that thereafter might be acquired by it, and required it to appoint an agent in the Province on whom service of process should be held to be service on the company. If a foreign corporation carries on business in this country through an agent or otherwise, it seems to be not more unreasonable to hold such corporation amenable to our insolvent laws than a foreign individual trader under the same circumstances. Even if the effect of a winding-up order in the case before us would be nothing more than to enable the liquidator to take possession of, realize and distribute the assets of the company within the jurisdiction of the Canadian courts; that alone would be sufficient in my opinion to justify us in putting the act in operation; but I cannot see why the liquidator could not go to England and, by the aid of the English courts, collect the calls, which, by section 38 of "The Companies Act, 1862," (under which this company was incorporated—see sec. 1 of our local act cap. 111, Acts of 1875,) form an asset of the company, and realize the other assets of the corporation within their jurisdiction, just as could be done by the Canadian assignee of an insolvent Englishman who had traded in Canada; see *Story's Conflict of Laws*, 7 edit., 408, 409, and *Selkirk v. Davis*, 2 Rose's Bankruptcy Cases, 219, 314, there cited. In the words of

GIFFARD, L. J., in *In re General Company for the Promotion of Land Credit*, L. R. 5, C. A., 363, "The foreign courts will recognize this winding up and will aid in carrying out any directions that may be given under it. The main object will probably be for the purpose of realizing the company's property, and I can see no reason why this company's property should not be realized abroad in the hands of the liquidator." If I am right in this, then, it seems apparent that our legislature did not go so far, in imposing restrictions upon the transfer of shares, and the power of the directors, &c., after the making of a winding-up order; for the result would be much the same as if the power to enact these provisions existed. If the English courts are to recognize the winding-up order made under our act, then the right to calls and all other assets of the company became vested in the liquidator as soon as that order was made, and directors left without capital or property would have nothing left upon which to exercise their powers, and a company thus denuded would have nothing but its corporate name with which to exercise its corporate functions.

Another objection urged against this winding-up order was that it was made without previous notice to the Merchants' Bank, a creditor of the company. It was said that, by sec. 24 of the act, it was apparent that no winding-up order could be made without naming a liquidator in it, and that, as the latter part of that section in express words required that such liquidator could only be appointed after notice to creditors, it followed that a winding-up order made without such previous notice would be invalid. I do not, however, read sec. 24 in the way contended. I think the word "such" only has reference to the appointment of more than one liquidator, not to the appointment of a liquidator. To make the section mean otherwise it would read thus, "but no such liquidator or liquidators shall be appointed, &c." Not only will the construction which I put upon this section be the grammatical one, but it will be consistent with the other sections of the act. There is nothing in section 13 from which it can be implied that a notice of the application for the winding up order is to be given to any one but the company,

and that only a four days notice. There then would exist no reasonable means of obtaining the names of the creditors so that they might be notified. And under section 14 it seems apparent that the court may at once make the order without adjournment or further notice. The act for the first time provides for the presence of other creditors under section 17, when, the company having opposed the winding up, there has been an adjournment; and, under the provisions of section 16, the means of discovering who the creditors are has been provided for. Besides, in the case of a Bank in which the act requires more than one liquidator (secs. 102 and 103) express provision is made (sec. 99) for a meeting of the shareholders before the order is made. I am of opinion that the proper construction of the act enables the court to appoint a liquidator, provisionally or otherwise, without previous notice to the creditors; but, before appointing more than one liquidator, such notice must be given. Holding these views, I am of opinion that the winding up order was properly granted and that the order to set it aside should be discharged with costs.

WEATHERBE, J.—The questions before us involve the construction of certain clauses of chapter 23 of the Acts of Canada for 1882, passed for the sole purpose of distributing the property of certain insolvent companies among their creditors,—a bankrupt law. The main objection to the proceedings impeached is that the act does not apply to foreign incorporated trading companies, notwithstanding the legislature has said in direct terms that “this act applies to * * * incorporated trading companies.” The only argument offered to convince us that these general words were not intended to embrace *foreign* trading companies, is that a limited application of the general words must be inferred from the striking unfitness of the act to deal successfully in laying hold of foreign companies in some instances, or rather from the impossibility of following the foreign contributories and recovering from them. Without entering at all into the discussion of that argument, or citing the authorities, it could not be denied that the English Courts have held the Imperial Winding-up Act, where the argument addressed to us would

equally apply, to include foreign incorporations. The only answer to this was that it was made to apply by express words. It must be obvious that this is hardly a satisfactory answer. Besides, the words of the English Act are, "any partnership, association, or company," which, I think, not more comprehensive and not so direct to encompass "foreign corporations" as the words in our Act. There seems to me to be no reason why the legislature should distinguish between foreign and domestic corporations in requiring them, when insolvent, to equally distribute their property and assets. The difficulty of laying hold of everything would be no reason to permit the first to take proceedings to absorb the estate, and the assignee can follow the assets with as great facility as the creditor himself. I see no difficulty in our way in construing this act, and I think, we have jurisdiction. The act distinctly says that "the winding up order must appoint a liquidator of the estate and effects of the company," and provision is made by which all the creditors and contributories are to have notice previous to the appointment of such liquidator. By the 30th section of the act it is provided that at any time after the presentation of the petition, and before the first appointment of a liquidator, the Court may appoint, provisionally, a liquidator of the estate, thereby clearly drawing a distinction between the liquidator mentioned in the 24th section, as required to be named in the winding up order, and a temporary liquidator. By the alleged winding up order a provisional liquidator is appointed, and I understand by this that the time has not come for appointment of the liquidator provided for by section 24, and, therefore, that the alleged winding up order is premature. I cannot understand that a provisional liquidator is required after "the first appointment of a liquidator," or that a winding up order can be made until such first appointment; therefore, I think this order is bad and should, on that account, be set aside. It was not pretended that any notice had been given to the creditors. The only argument against this conclusion by Mr. Sedgewick, was that section 14 gave power to make a winding up order *ex parte* immediately on the application, which seems to me directly at variance with the letter as well as the

scope of the act. Sections 24, 32 and 35 are under the general head of "liquidators," section 24 being the first section on that subject. Section 32 provides that "the liquidator" is to be paid as the Court directs, "upon such notice to the creditors, contributories, shareholders or members, as the Court may order." And by section 35 the duties of "the liquidator" are defined, and by this section he obtains his power, with the sanction of the Court, and "upon such previous notice to the creditors, contributories, shareholders, or members as the Court may order." The words "such notice" and "such previous notice," in these sections, necessarily refer to section 24, where the words, "previous notice to the creditors, contributories, shareholders or members," are used. If anything were required, this, it seems to me, would be conclusive to show, not only that notice was necessary before the appointment, but that the notice referred to cases where one liquidator was to be appointed, as well as where more than one were to be appointed; or in other words, that the notice refers to the singular as well as the plural number. That argument, however, was hardly required, considering that by the interpretation act, words importing the singular number shall include more persons of the same kind. I read section 14 as merely conferring jurisdiction upon the Court to make the order applied for, to dismiss the petition, or make any other interim order, and, before the proceedings upon which that order applied for are to be ascertained, section 24 must be read, which shows the necessity of a previous notice to the creditors and others, and the appointment thereafter of the liquidator, who must be appointed in the express terms of the section, in and by the winding up order. I have no difficulty in ascertaining that the Court may, by the publication of a notice in newspapers, or in any manner and form the Court may prescribe, or, to use the language of section 35, "as the Court may order," call the creditors and others together. In the meantime section 30 gives power to appoint provisionally a liquidator, to whom the custody of the property may be committed, which, in the absence of the appointment, would be vested in the Court, subject to any rules or directions which may be made under the provisions

of the act. Large powers are given to the Court, who may make such rules as seem proper for the distribution of all the property among the creditors. It will be observed by section 31 of the act, that if the Court should appoint a liquidator without consulting the creditors, unless "provisionally," he could not be changed after the meeting, except "upon due cause shown"; and I see no inconvenience whatever, in this age of speedy transmission of notice, in this construction, and as the legislature intends the property to be disposed of for the benefit of the creditors, I should have expected some power in the Act to call these creditors together at once, or give them the means of being represented at a meeting fixed for such period as might seem best adapted to their interests, before the appointment of so important an officer as liquidator. Under section 38, if this winding-up order, which has been made without any notice to the shareholders, is to be held good to appoint a liquidator *ex parte* as the powers of the directors cease, they could not, as they otherwise might, immediately take measures to prevent the necessity of so serious a step as the making of a winding-up order. Foreign directors, by the use of the telegraph might, in a few hours, relieve their property from the custody of the court, by satisfying the creditors' claim, and proceed with their ordinary business. And I am not aware of anything to prevent the creditors and others, upon notice, from making an arrangement by which the winding-up order may be dispensed with. I need not say that I have every respect for the opinions of those of my brethren who take a different view of this order, but, except for that view, I should entertain no doubt whatever about the construction of the Act respecting the appointment of the liquidator and the broad distinction between the liquidator proper and one provisionally appointed, which the act seems to me clearly to make.

SMITH, J.—I did not think it necessary to prepare a written opinion in this case, as I concur with those of my brethren who think that the Dominion Parliament had power to pass the act under which the proceedings were taken, and that the provisions of the act apply to corporations doing business here, although under a foreign act of incorporation. I am of

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opinion, however, that the winding-up order is bad, for the reasons given by Mr. Justice WEATHERBE, the provisions of the act not having been complied with.

MCDONALD, J.—Because the English statute, under the provisions of which this company was incorporated in England, does not extend to Canada as it might, if so expressed by Parliament, we must regard the company's charter as one the existence of which is dependent upon foreign legislation not operative here, and I think that in this province, in the absence of any binding statute to the contrary, the individual or rather the constituent members of this so-called corporation, like members of all companies unincorporated in this Dominion might be sued in their individual names,—alleging that they did business under the name of the “Steel Company of Canada.” If they would defend, either in whole or in part, on the ground that they were a corporate body, incorporated under a statute of the British Parliament, with limited liabilities, or that the action was improperly brought against the individuals instead of the corporation, the answer would be that the statute under which, as individual defendants, they claimed immunity from personal liability did not apply to Canada or any Province of Canada, that the plaintiff did not know and was not bound to know that such a statute or such a corporation ever existed, that the contract was made without reference to either, and that, therefore, in deciding the rights and liabilities of the respective parties the question must be considered as if no charter had been given. In such case I am inclined to think that, in the absence of anything else to the contrary, the defence would not prevail. If I am correct in regarding this company as a foreign corporation—and I suppose that will not be questioned—let us see what the result might be if it was held that it carries with it all its rights and obligations wherever it goes, if go it can, which I think it can not. To see that let us suppose that a number of individuals form themselves into a body corporate by legislative or other authority in France, with limited liabilities; that such corporation as a company, under the corporate name, does business here as any number of persons have a right to do, using the name by which the corporation exists,

not here, but in France, and that the company contracts debts to the extent of millions. The creditors are not supposed to know the French law or French charters, but suddenly they find that by a French charter the individuals, with whom they dealt under British law, and who so became individually indebted to them, are, in virtue of a French charter, only liable for one-half of the indebtedness. But that is not all; because, as the power that creates corporations and controls the liabilities of such corporations can change such liabilities, the creditors may find that even the limited liability may after a time, by foreign legislation, be changed into no liability whatever. Such would be the possible result of holding that foreign corporations, as such, carry with them into this country the rights and liabilities which they have in the country of their creation. I think that upon legal principle they do not. No doubt there are authorities apparently leaning to an opposite view, but to a very limited extent and not at all in this case binding upon us. The Companies Act passed in the British Parliament authorized the winding up of companies other than incorporated companies; ours does not and hence one of the difficulties. That the Steel Company of Canada is a company in this Dominion which, if our statute had been the same as the English statute, could be wound up under it so far as Canadian legislation could control the assets, I have no doubt whatever; but the two statutes are not the same by any means; and I would be surprised to find that in the absence of such legislation as exists in England, (but not here), the English courts would take notice of foreign corporations as we are asked to do in this case. In the absence of legislation requiring us to take judicial notice of foreign corporations doing business as such in this country, I cannot regard them otherwise than as unincorporated companies doing business here under whatever name they wish to adopt, whether it be the foreign corporate name or any other that they may think fit. But the act passed by our local legislature enabling this company to hold property in this Province is important in two respects. First, the company by applying for and obtaining it recognized the fact that but for that act the foreign charter was valueless to enable the company to hold the property

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mentioned in the act in order to carry on its operations ; and again the legislature by that act recognized the company in express terms as a foreign corporation, and conferred upon it the right to do business, and for that purpose to hold property within the Province as if it had a charter here. It was in virtue of that act and not alone of the foreign charter that the company could hold the property now sought to be utilized for the benefit of the creditors ; it giving to the company by local legislation a position analogous to that occupied in England by foreign corporations which are registered in that country. If that act had not been passed I am inclined to think that these proceedings would be unauthorized by law ; but as the power of the parliament of Canada cannot be disputed in matters of insolvency, to control the assets of any body, corporate or otherwise, within Canada when such assets are acquired and held by virtue of Provincial legislation within the Dominion, it follows as I think that this court or any of its judges had jurisdiction in the matter in which the order was made. While, however, I am of this opinion as to the question of jurisdiction I concur entirely with my brother WEATHERBE touching the irregularity of the order now sought to be set aside on that ground. With these views I am glad to think that although the setting aside of the order for irregularity may cause some delay, it will not otherwise prejudice the substantial rights of the parties.

MCDONALD, C. J.—The petition for the winding-up order alleges the “Steel Company of Canada Limited” to be “a company incorporated in England under the Companies Acts of 1862 and 1867, and having *one* of its chief places of business at Londonderry, in the County of Colchester, in the Province of Nova Scotia,” and that “it is insolvent, &c.” Thereupon, a winding-up order was made by Mr. Justice RIGBY, on the first day of December last, from which an appeal was taken by the Merchants’ Bank of Halifax, a creditor of the company, which was argued before us, and now stands for judgment. Mr. Henry, on the part of the appellants, urged :—

1. That the Court has no jurisdiction to make this order, inasmuch as the Dominion Winding-up Act of 1882 does not

apply to foreign companies ; or in other words. that "incorporated trading companies," in that statute, means trading companies incorporated by the laws of Canada, or one of the Provinces of Canada.

2. That the order is irregular and void, because of non-compliance with the requirements of section 24 of the Act.

In my opinion Mr. Henry's contention on both these points must prevail. It is admitted that there is nothing in the statute to indicate any intention by parliament to exceed its legitimate jurisdiction, and no legislature will be presumed to have done so. It is clear, I think, that the Parliament of Canada has no power or authority to dissolve or otherwise to affect by legislation a foreign company, except in so far as such foreign company may, by its own act, become subject to the laws of Canada. In *Bulkley v. Schutz*, L. R., 3 P. C., 769, Lord Justice JAMES said : "Their lordships are clearly of opinion that that Act, (the Act of 1862,) never contemplated that a foreign partnership actually complete and existing in a foreign country, could be brought within the provision of the English Act of Parliament ; *the English Legislature has no power over the shareholders of such company.*" And Lord Justice MELLISH in *Re Oriental Steam Co.*, L. R., 9 Ch. App., 559, affirms the same principle in these words : "I quite agree that the 87th section of the Act of 1862, (the 20th section of the Canada Act,) providing that no action shall be brought without the leave of the Court, and the 163rd section, enacting that no execution shall issue, *apply only to the courts of this country. Of course Parliament never legislates respecting foreign courts*, nor is it usually considered to be legislating respecting Colonial Courts or Indian Courts unless they are expressly mentioned." And the learned author of *Lindley on Partnerships*, referring to the power of parliament over a foreign company, says : "But the writer apprehends that it is not competent for any court in this country to dissolve a body corporate created by a competent foreign authority, *and a foreign corporation therefore cannot be wholly wound up and dissolved in this country.* At the same time, if a foreign incorporated company were registered, (under the Act of 1882,) *the corporate body created by the registration might be*

wound up and dissolved, without any undue exercise of jurisdiction." The intent of the winding-up acts in England and in this country is to put the affairs of the company, liable to be wound up, under the absolute control of the court for the purposes of the act. Unlike the assignee in bankruptcy, the liquidator, when appointed, is the trustee for the company and the creditors, and the officer of the court, subject to its orders and liable to be removed at its pleasure; the liabilities of contributories, the claims of creditors, the collection of the assets, the prevention of suits and litigation against the company while being wound up, are all powers absolutely exercised by the court, and essential to the discharge of the duties imposed upon it by the act. If the court, for any reason, cannot efficiently exercise these functions, its powers become paralyzed. In *Re The National Pulp and Paper Co.*, 3 Ch. D., 598, JESSEL, M. R., asks, "What is the object of winding up? It is to distribute the assets of the company rateably amongst its creditors, and enforce contributions against its shareholders or contributories, and make them pay what they are liable to pay with a view to liquidating the affairs of the company. How is that effected? By stopping all actions or suits brought against the company when the winding up is commenced, so as to compel the creditors to come and share rateably." And then,—discussing the extent of the jurisdiction of the court within the United Kingdom,—he continues: "There can be no reason, that I can find, for limiting them, (the powers of the court,) except that this court has no power to enforce its order. I agree that if a creditor in Turkey, Russia, or any other purely foreign country were to bring an action, although it would be desirable in the interests of the persons concerned in the litigation, to make that creditor come in with the rest, yet the court cannot restrain the action, for the want of power, not from the want of will, or want of provisions in the Act of Parliament, but simply that the Act of Parliament cannot give this court jurisdiction over Turkey or over Russia," * * * * *

"therefore, as to a purely foreign country, it is no use making an order because the order cannot be enforced." The Steel Company of Canada is as much a foreign company in Canada

as if it derived its corporate powers from Russia or Turkey. We know nothing of it, except what is stated in the petition for winding up, "that it has one of its principal places of business at Londonderry, in the Province of Nova Scotia." It may have, and probably has, other places of business beyond the Dominion of Canada; its bond-holders, shareholders, contributories, are all, so far as our information goes, in a foreign country. The capital, assets and property of the company, other than the property at Londonderry, are also, I presume, beyond the jurisdiction of the Canadian Parliament and Canadian Courts. How are actions to be restrained? How are contributories to be compelled to pay the amounts due by them? How, indeed, in any one of the necessary and important powers conferred upon it, can the Canadian Court exercise its functions or enforce its authority? It would strike one as something incongruous to see the courts in this country occupied in distributing, (if that be possible,) the proceeds of the property of the company found at Londonderry; while the directors, shareholders, and bond-holders of the company in England, Scotland, or Japan, continued to prosecute the business of the company, pay dividends, prosecute and defend suits, safe from injunction or restraining order, the harmless thunder of Canadian Courts. I cannot assume, in the absence of any such indication in the words of the statute, that the Canadian Parliament, using apt words to specify subjects strictly within its legislative jurisdiction, means other and different things and words or intended to enact laws relating to matters beyond its jurisdiction and control, and to impose duties upon Canadian Courts which they would be powerless to discharge. But it is contended that foreign companies have been wound up under the Act of 1862 in England. That act is very different in its language and scope from the Canadian statute! Our statute relates only to "incorporated trading companies," while the English act extends to companies *registered* under the act; also, by section 199, to *any partnership, association or company*, although not registered. Under the latter section English Courts have dealt with foreign companies and associations, (doing business and having offices in England,) as English partnerships or as

associations, and have wound up the business of such association or partnership. These courts have also, as LINDLEY states, wound up foreign companies *registered in England*, on the ground, as he says, that, by registration, an English corporation was *created*, which the courts had jurisdiction to *extinguish*; but I have failed to discover any case where a purely foreign company was wound up in England, except under the circumstances referred to. Before passing from this branch of the case, perhaps I ought to refer, for a moment, to the *Commercial Bank of India*, L. R., 6 Eq., 517, cited by Mr. Justice RIGBY. In my judgment, the facts of that case as reported, do not justify the conclusions drawn from the decision. The winding up of the Bank of India was made in connection with another banking concern *registered in England*, and being then wound up. The capital and assets of the former institution had been merged in that of the latter before the application for winding up was made. In fact the Indian Bank had no capital or assets to wind up, except what was in the hands, and formed part of the capital and assets, of the English concern; and it will be observed that the M. R. puts his assumption of jurisdiction expressly on the ground of convenience, and that only.

It was further contended that the local act of Nova Scotia, chap. 111, Acts of 1875, gave the "Steel Company of Canada" the character of a Provincial Incorporation; and, if I correctly understood the argument, so purged the Steel Company of its foreign character as to bring it within the benign jurisdiction of Canadian laws and Canadian courts. Now that statute is composed of four sections enacting:—

1. That the Steel Company of Canada, limited, a company incorporated in England "under the Companies Act, 1862, and the Companies Act of 1867," may hold real estate.

2. Gives power to expropriate real estate and lands for certain purposes.

3. Gives power to construct tramways or railways subject to control of sessions.

4. Authorizes service of process against the company in this country on agent or otherwise as directed in the act.

Now, with all respect, it appears to me that nothing could more strongly indicate the intention of the Nova Scotia legislature to deal with this company as a foreign corporation than the provisions of this act. The foreign character is carefully and distinctly asserted, and the limits of the rights to be exercised by it in this Province, so far as these rights depended on local legislation, as distinctly defined. Surely the legislative permission to a foreign company to hold lands for special purposes, and on special conditions, cannot be held to convert that foreign company into a Canadian corporation. In my opinion the statute has no such effect, the legislature had no such intention in passing it, and it does not aid the argument of Mr. Sedgewick.

It is also said that, assuming the act to apply to this company, the order is irregular and must be set aside, inasmuch as a liquidator was not appointed in and by the winding-up order as required by sec. 24 of the act. The winding-up order appoints Mr. Duffus "provisional liquidator of the said company." The winding-up clauses of the Canadian act we copied substantially, if not literally, from the English act of 1862. There appears, however, to have been one or two attempts at originality and one of these has I think caused the apparent difficulty in the construction of sec. 24. Sections 18 and 30 of the Canadian act are made by splitting sec. 85 of the English act into two. These clauses read together as they are in the English act remove all difficulty. It is the clear intention of the act, as it is the practice regulated by rules of court in England, that notice shall be given before "the liquidator" is appointed, and before the winding-up order is made. The presentation of the petition puts the affairs of the company under the absolute control of the court, and the court may thereupon restrain all proceedings (sec. 18) and appoint, if in the opinion of the court it be necessary, a "provisional liquidator" with such powers as the court may think proper to confer upon him until the winding-up order be made, appointing after due notice "the liquidator." Section 24 says:—"The winding-up order shall appoint a liquidator or liquidators," but "no such liquidators shall be appointed unless a previous notice be given to the creditors, contri-

butories, shareholders, or members, in the manner prescribed by the court." It is quite evident, I think, on a careful perusal of secs. 18 and 30, that the "provisional liquidator" authorized in the latter section, cannot be "the liquidator" required by sec. 24, to be appointed by the winding-up order, and I think it equally clear that the legislature intended a notice to the interested parties named in sec. 24 before the final order should pass:—first, that they might, if possible, show cause why such order should not be made; secondly, that they might have the opportunity of protecting their interests in the appointment of "the liquidator." Section 23 of the act indicates clearly the intention of parliament that the court should give reasonable consideration to the views and wishes of the creditors, contributories, and shareholders in the management of the estate—even after the liquidator is appointed,—and it is difficult to imagine, in the face of that intention, that it should give power to make the most important and material order in the whole proceeding, without notice to the parties interested or opportunity to be heard. Such a course would, I think, be contrary to the spirit of the Canadian act, as it is contrary to the practice under the English act. For the reasons above given I am driven to the conclusion that the winding-up order made herein is irregular and must be set aside,—that is of course on the assumption (which I am bound to adopt, in deference to the majority of the court,) that my opinion as to want of jurisdiction in the court is erroneous.

HALIFAX BANKING CO. v. WORRALL.

Before McDONALD, C. J., and McDONALD, RIGBY and THOMPSON, J J.

(Decided February 11th, 1884.)

Abandoning Debtor Process.—Second summons to same agent.

It is no objection to a summons to bring in an agent under the abandoning debtor process, that a previous summons has been issued for the same agent.

This was an appeal from a decision of RIGBY, J., discharging an order *nisi* to set aside a writ of summons issued under *Revised Statutes*, (4th Series,) Chapter 97, "Of absent or

absconding debtors," calling upon the defendant's agent to disclose what goods of the defendant were in his hands or possession, or under his management or control at the time of the service upon him of the writ of summons. The order was taken on the following, among other grounds :—

Because the said writ of summons is a nullity, a previous writ of summons for the same agent having issued.

Because the Prothonotary had no jurisdiction to issue the writ, as the issuing of a second summons against and to bring in the same agent or trustee of an absent or absconding debtor a second time in the same suit, is not authorized by the statute in that behalf.

Because the issuing of said summons is not authorized by statute and was and is irregular, and said summons is a nullity.

The judgment of RIGBY, J., appealed from was as follows :—

It was contended that the only authority for summoning the agent of an absconding debtor was contained within the chapter of the *Revised Statutes*, 97, and as that chapter did not in express terms authorize an agent to be summoned more than once in the same suit, the second summons should be set aside as illegal and void.

It seems to me, however, that, as service on the agent only binds goods and credits of the debtor then in his possession or under his control, the same authority which permits an agent to be summoned in the first instance is sufficient to authorize the issue of a second or other summons against him, if the plaintiff should have reason to believe that after the original service the agent had become possessed of property of the defendant, nothing being found in the statute inconsistent with this view.

Meagher, Q. C., in support of appeal, cites *Practice Act, Revised Statutes*, chapter 97, section 18; *6 Wendell*, 506; *Drake on Attachments*, section 85. The issue of the summons is ordered under a special jurisdiction given by special statute, and prior to the statute no such proceeding could be taken. The remedy cannot be extended beyond the legislative grant. (*McDONALD, J.*—Of course it cannot be extended if it was not the intention of the legislature.) It is not a question

of intention. The law goes this far that the remedy cannot be extended beyond the legislative grant. It might be proper that further power should be given, but the question is whether it has been given. This is not a matter of procedure, but a question of jurisdiction. *L. R.*, 23 Chan. Div., 685, shows the principle the court will act on in the construction of a statute giving a new jurisdiction. If a second summons can be issued, a second writ of attachment can be issued. (RIGBY, J.—That is different. The first writ answers the purpose, but I cannot see why a second writ should not issue if the first expires.)

Graham, Q. C., contra, was not called upon.

MCDONALD, C. J.—We are all of opinion that the order was right, and that it is not necessary to call upon the other side. Appeal dismissed.

RE ESTATE OF CHANDLER.

Before MCDONALD, C. J., and MCDONALD, RIGBY, and THOMPSON, J. J.

(Decided February 11th, 1884.)

Mortgagee's rights on bond.—Kenny v. Chisholm.

Held, that a mortgagee who has foreclosed and sold and bought in the land at sheriff's sale and is in possession of the land can rank upon the estate of the mortgagor for the balance over the proceeds, and cannot be compelled to give credit for the actual value of the land.

This was an appeal from a decree of C. E. DEWOLF, Esq., Judge of Probate for the County of Hants, allowing a claim filed by Joseph Rickards, of Windsor, in the County of Hants, against the estate of John M. Chandler, late of Windsor, intestate. The claim filed charged the estate with the sum of \$905.33, being the amount of a bond and mortgage on a house and land of the intestate, of which Rickards was mortgagee, including interest and costs of foreclosure, and credited the sum of \$420, being the amount paid by Rickards for the property at the Sheriff's sale, leaving a balance, for which he claimed to rank against the estate of \$485.33. At the hearing before the Judge of Probate, the mortgagee stated that when he let the money on the property he considered it to be worth

\$1200, and that he thought the property was worth more than he bid on it at the auction sale. No other bid was made.

Drysdale, in support of appeal.—We should be credited with the real value of the land. The mortgagee admits that he is more than paid. (RIGBY, J.—The case is exactly the same as *Kenny v. Chisholm* unreported. The only difference is that it is stronger, because here there was the opportunity of redeeming. *Ritchie, Q. C.*—The mortgagee offered to give up the property on receiving the amount of the mortgage.) The mortgagee admits that the value of the property is in excess of what he paid for it; *Kent's Commentaries*, vol. 4, p. 216. (RIGBY, J.—The mortgagee is bound to give the property up to you.) But suppose we do not see fit to redeem. (RIGBY, J.—Then you must take the consequences.) We are not bound to take the property or to redeem. We admit the mortgagee can sue for the deficiency, but having bought in the property for a nominal sum, he should not be allowed to keep the property and claim the whole balance. Here the mortgagee values the property at more than his whole claim, and yet sues for the deficiency. It appears that there was no bidding at the sale, and it was therefore no test of value. Where there is no sale the value of the property must be estimated. What I contend is that the mortgagee having bought in himself for a nominal sum at a sale where there was no competition, it is the same as if there was no sale, because there is no test of value.

MCDONALD, C. J.—We think you cannot get on Mr. Drysdale.

Appeal dismissed.

PREEDY v. BALDWIN.

Before McDONALD, C. J., and SMITH, WEATHERS, and RIGBY, J. J.

(Decided February 25th, 1884.)

Jurisdiction as to amount.—Debt reduced by cash payments.

PLAINTIFF sued on agreement that he should receive \$800 as the full amount due him on a settlement of partnership accounts, said amount to be paid from proceeds of partnership debts to be collected. Defendant contended that none of the debts were collected before November, 1881, so that nothing was due until then; that the payments credited by plaintiff being previous to that date, could not be connected with his claim, which was therefore beyond the jurisdiction of the court.

Held, that the payments were made on account of the agreement, and that the debt having been reduced by cash payments, the plaintiff's claim was within the jurisdiction of the court.

This was an appeal from a judgment of J. W. JOHNSTON, Esq., County Court Judge for District No. 1. Plaintiff and defendant, having carried on a glass and crockeryware business as co-partners under the firm name of Baldwin & Co., entered into a written agreement on July 1st, 1880, for dissolution of co-partnership, the defendant covenanting that he would well and truly pay plaintiff the sum of \$800 in full, as representing the entire interest and claim of the said plaintiff in and to the co-partnership business and the assets thereof, in the following manner: such payment to be made by a per-centage of twelve and one-half per cent. on the outstanding accounts contracted prior to the seventh day of June last, but only to the extent of said \$800, and in the event of the said per-centage money not amounting to \$800 six months hence, then the balance still due thereon to be paid in cash on the first day of January, A. D. 1882.

Plaintiff, in his particulars of demand, after crediting defendant with cash and goods received by him, and cash paid on his account, claimed a balance due of \$295.12.

At the trial the defendant's bookkeeper was called, on behalf of plaintiff, and proved that \$6,700 of the debts of the old firm had been collected up to November 27th, 1881. It was also proved that, for a time, plaintiff was paid \$30 a week on account of the per-centage.

The following was the judgment appealed from:—

The whole original claim of the plaintiff was \$800. It was reduced by cash payments and a small offset of \$8.10,

and the balance of claim sued for was \$294.12. There might be something in Mr. McDonald's objection that the amount was beyond the jurisdiction of this Court, had the amount sued for been beyond the jurisdiction, and the plaintiff sought to bring himself within the jurisdiction by a mere set off, not allowed before the action, or by a payment not allowed before the action, so as to constitute a part payment in reduction of the original claim.

But where the plaintiff only claims an amount within the jurisdiction, it may be that the Judge may have to investigate amounts and accounts to a larger sum in order to arrive at the justice of the claim and find the amount actually due. Here the plaintiff was entitled to \$800 in full of his interest in a partnership business, to be made by a percentage of $12\frac{1}{2}$ on debts contracted prior to 7th June, and, in the event of the percentage not amounting to \$800 in six months from the date of this agreement, then the balance to be paid in cash on 1st January, 1882. On this agreement the plaintiff had received from the defendant \$505.88. It was in proof that previous to January the receipts from the accounts had amounted to more than sufficient to make \$800 by a percentage of $12\frac{1}{2}$. The plaintiff therefore had a complete right of action at the time he instituted proceedings, not to the \$800 but to the balance unpaid.

There was sufficient *prima facie* proof at least that an amount had been received sufficient to make \$800, and this the defendant did not attempt to rebut.

Judgment for plaintiff for \$294.12.

A. McDonald, in support of appeal.—The sole question is, whether the case was brought within the jurisdiction of the County Court. The plaintiff's original claim was for \$800 on a settlement of partnership accounts, which was reduced by cash payments made by defendant to plaintiff, to various other parties, and by contra account. Cites *1 Pugsley*, 99. The debt to plaintiff was created by the deed which is shown not to have been made until the middle of July. Plaintiff credits an amount of \$152 received before that date. There could not have been a credit before there was a debt. (WEATHERBE,

J.—They argue that the deed shall take effect from the date. McDONALD, C. J.—What evidence is there that the deed was not executed on the day it bears date?) The plaintiff says so. It is not shown that any money was collected prior to November 27th, 1881. There was, therefore, no debt due for which an action could be brought until the 27th November, 1881. All the credits are before that date, and cannot be relied on as payment.

Ervin & Wallace, contra.—Plaintiff was not bound by the agreement to remit until the whole amount was collected. Whenever Baldwin had collected \$1 Preedy was entitled to receive $12\frac{1}{2}$ per cent. on it. A set off admitted or allowed before action will reduce the amount below the jurisdiction. That is the case here. Defendant admits that the amounts were paid on account of the amount plaintiff was to receive.

MCDONALD, C. J.—I am of opinion that the appeal must be dismissed with costs. It is clear to my mind that the intention was to pay the plaintiff the percentage as the money was collected, and that, therefore, at the time of action brought the debt was due. The cash payments were proved and the Court had jurisdiction.

SMITH, J.—I entertain the same view.

WEATHERBE, J.—There seemed to be something in Mr. McDONALD's contention in regard to the law, but it seems to me that the case turns on questions of fact. I think the items were intended as cash payments, and as payments on the agreement.

RIGBY, J.—I think there was evidence that the payments were made in pursuance of the agreement to justify the finding of the Judge.

GOURLEY v. CARTER.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided February 25th, 1884.)

Demurrer.—Statement of matter of law.

THE only matter of law to be argued in a demurrer was contained in a note on the margin of the demurrer.

Held sufficient to satisfy the statute, cap. 94, section 131, Rev. Stat., 4th Series.

This was an appeal from a judgment of G. A. BLANCHARD, Esq., County Court Judge for District No. 4, dismissing an order *nisi* to set aside a demurrer to one of defendants pleas. The action was for taxable costs, to which defendant pleaded, for a second plea, that no signed bill of the costs and fees and charges sued for was delivered by the plaintiff to defendant one month before the commencement of the suit. Plaintiff, having obtained an order to reply and demur, demurred to the defendant's second plea on several grounds, and inscribed a note on the margin of the demurrer as follows:—

One of the matters of law intended to be argued is that there is no law or practice in this province requiring a signed bill of the costs, fees and charges sued for herein to be served upon the defendant by the plaintiff one month before action brought.

Borden, in support of appeal.—Where a demurrer is frivolous the proper mode is to move to set it aside; *Ross v. Robinson*, 3 Dowl., 779. The third demurrer is merely a matter of form. (WEATHERBE, J.—Would the marginal note be good ground.) It would if it were in the demurrer, but it is not there at all. (RIGBY, J.—It is the only thing in the demurrer that expressly states a matter of law to be argued.)

The case from 3 *Dowling* shows that the first ground is bad. Cites *Morrison v. Kandick*, 2 R. & C., 148. The only reasons given in the demurrer are frivolous.

WEATHERBE, J.—The only question is whether a ground written in the margin is within the words of the statute.

THOMPSON, J.—I should be sorry to see any doubt thrown on the practice of stating the ground in the margin. It has prevailed down to within last week.

Rule discharged.

COSSITT ET AL. v. COOK.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided February 27th, 1884.)

Promissory note.—Parties.—Consideration.—Novation.

A., who was indebted to plaintiffs, sold defendant a threshing machine, and in payment for the same, received from the defendant a promissory note, which, at A.'s request, was made payable to the plaintiffs. A. forwarded the note to plaintiffs in part settlement of their account against him. A. was not acting as plaintiffs' agent in selling the machine, did not inform them about the transaction, and had no agreement with them that the note should be taken in their favor.

Held, that plaintiffs could not recover because there was no consideration for the note moving from plaintiffs to defendant and no evidence to support a novation.

This was an appeal from a decision of G. A. BLANCHARD, Esq., County Court Judge for District No. 4. The action was upon a promissory note given by defendant to A. C. VanMeter & Co., of Truro, in the County of Colchester, dealers in agricultural implements, in payment for a threshing and fanning machine purchased from them. At the request of VanMeter & Co., who were indebted to the plaintiffs in a large amount, the note was drawn in plaintiff's favor and was forwarded to them by VanMeter & Co., in part settlement of their account. It appeared in evidence that VanMeter & Co. were not acting as plaintiff's agents in the sale of the machine, never informed them about the transaction, and had no agreement with them that the note should be taken in their favor. Before the note was taken plaintiffs had no knowledge of it. The judgment appealed from was as follows:—

This case appears to me to be clearly distinguishable from that of *Forsyth v. Forsyth*, 1 R. & G., 380, especially as in the latter case there was no debt due from Forsyth, the father to the plaintiff, and no assent on the part of the plaintiff to accept the note received by the father from the

defendant in the name of the plaintiff in lieu of any testamentary provision that might otherwise have been made by the father in the plaintiff's favor, and no valid consideration for the promise as between the father and the plaintiff.

In the present case the defendant was indebted to VanMeter & Co. for a threshing machine, and VanMeter & Co. were indebted to the plaintiffs in a much larger sum than the price of the machine, and procured the note to be made by defendant to plaintiffs and transmitted the same to pay part of said VanMeter & Co's debt to plaintiffs, which note was accepted by plaintiffs therefor, and credit given by them in their account with VanMeter & Co.

In this transaction it would seem to me that VanMeter & Co., by forwarding the note to plaintiffs, virtually released defendant from payment to them, and that plaintiffs, by accepting the note and giving VanMeter & Co. credit therefor, virtually extinguished their claim against VanMeter & Co. to that extent. It was as if the note had been made to VanMeter & Co., and by them endorsed to plaintiffs, without any liability on their behalf on said note, and accepted by plaintiffs in reduction of VanMeter & Co's debt.

This has a strong resemblance to the case proposed by Chief Justice Sir W. YOUNG, in the argument of *Forsyth v. Forsyth* to the counsel arguing on behalf of defendant therein. It was this: 'Suppose a man leaving the country sells a ship, and instead of taking a note to himself instructs it to be made to a bank to which he owes the amount.'

Defendant's counsel replies:—"The cases are entirely different. The one put by your Lordship is a well recognized exception. In that case the man who sells the vessel owes the bank, and the man who buys her is indebted to him. The bank says to the purchaser, if you pay us we will release the seller and you from your obligation to him. There is there a distinct consideration which is entirely wanting here. The transaction is called a novation."

If this be law, as I think it is, and it seems to have been recognized by the Court as such, I regard the present case as so similar that I do not feel myself justified in granting the non-suit asked for, and, as the plaintiffs have otherwise

sufficiently established their case as regards the defence set up, I give judgment for the plaintiffs for the amount of the note sued on and interest.

Townshend, Q. C., & M. Townshend, in support of appeal.—There was no consideration for the note as between the plaintiffs and defendant; *Forsyth v. Forsyth*, 1 R. & G., 380. (WEATHERBE, J.—My judgment in that case was based on the decision in *Tweedle v. Atkinson*, 1 B. & S., 398. THOMPSON, J.—I think decisions since then run rather the other way.) The evidence shows the most complete want of knowledge and mutuality on the part of the plaintiffs, which is essential; 4 B. & Ad., 433; 4 B. & C., 162; *Baker v. Reid*, 2 N. S. Dec., 199; 1 *Smith's Leading Cases*, 282. There was clearly no novation; *Addison on Contracts*, pp. 272, 273, 274. If there was a novation a special declaration would be required.

Drysdale & Meagher, Q. C., contra.—The novation is complete. There is evidence of an assent all round after the making of the note. There is no case which requires all parties to be present. VanMeter sent the note to plaintiffs in reduction of his account, who received it. VanMeter was the general agent of the plaintiffs, though he did not act as such in the sale to defendant; 9 C. B., N. S., 452. (WEATHERBE, J.—There is no communication between the plaintiffs and defendant.) It was not necessary. The defendant gave the note and plaintiffs accepted it. The promise here was not made to VanMeter for the plaintiffs, but directly to the plaintiffs at the request of VanMeter. In *Forsyth v. Forsyth* there was no consideration moving from the plaintiff to the person who made the note (THOMPSON, J.—What consideration was there moving from Cossitt.) The discharge of VanMeter. *Lindley on Partnerships*, vol. 1, p. 450; *Byles on Bills*, 204; *Clark on Bills and Notes*, 43; *Daniel on Negotiable Instruments*, vol. 1, sec. 176; 4 H. & N., 602; 9 *Allan*, (Mass.) 45. There is no specific ground to enable objection to be raised to any particular evidence.

M. Townshend, in reply.—The plaintiff must succeed on the question of novation or not at all. For this purpose the evidence must be express. *Baker v. Reid*, cited *supra*;

Leake on Novation, 793. The plaintiffs could not possibly assent to a transaction they knew nothing about. They thought the note was sent in the ordinary course of business. The consideration for the note must be complete at the time of its delivery. Supposing the note given by Cook was in the nature of an offer, there is no evidence of the communication to him of the acceptance of it.

MCDONALD, C. J.—The Court are of opinion that the rule for appeal must be made absolute. First, on the authority of *Forsyth v. Forsyth*, and secondly, on the ground that there is no evidence of novation.

THOMPSON, J.—I very much regret the state of the law which obliges us to decide in accordance with *Forsyth v. Forsyth*. I would prefer following the American decisions if we were not bound by the English decisions. I think there is no evidence of novation.

QUEEN v. RINES.

Before McDONALD, C. J., and SMITH, WEATHERBE, RIGBY and THOMPSON, J. J.

(Decided March 1st, 1884.)

Certiorari.—No steps within a year.

RULE absolute in the first instance to quash a certiorari on the ground that no steps had been taken within a year.

Eaton moved for a rule absolute in the first instance to quash a writ of certiorari on the ground that no step had been taken within a year. Cited *City of Halifax v. Vibert*, 3 R. & C., 54.

MCDONALD, C. J.—The practice appears to be settled. Take your rule.

Rule absolute.

EVANS v. THE STADACONA FIRE AND LIFE INSURANCE COMPANY.

Before McDONALD, SMITH, WEATHERBE, and THOMPSON, J J.

*(Decided March 6th, 1885.)**Conditions in policy as to rateable apportionment.*

PLAINTIFF was insured by the defendant company under a policy which contained a condition for apportionment of loss with any other company in which plaintiff should be insured. Plaintiff was insured at time of loss in another company to the same amount as in defendant company, and defendant company contended that they were only liable for half the loss, and took a rule to set aside a verdict found for plaintiff for \$191.71 in excess of half the loss. The first-mentioned policy described the subject of insurance as "stock and tools in building and yard to the extent of \$1000." Under the last-mentioned policy, which apportioned the amount insured thus: "on stock in building, \$200; on stock in yard, \$700; on tools and benches in building, \$100," the plaintiff received \$144.97, which amount was \$191.71 less than half the loss.

Held, that the verdict could not be disturbed.

Plaintiff having recovered a verdict against the defendant company for the sum of \$191.71 in an action on a policy of Fire Insurance, a rule was taken to set the verdict aside with power to the court to order a verdict to be entered for defendant or to reduce the same on the following grounds:—

First. Because the defendant company were only liable to a rateable proportion, to wit, half of the loss, the property having been insured in the Provincial Insurance Company of Canada for the same amount as in the defendant company.

Second. Because the defendant company were only liable to pay \$336.67 of said loss, being the amount paid into court herein, in view of the 20th and 14th conditions in defendant company's policy, and the conditions in the policy of the Provincial Insurance Company of Canada.

Third. Because the policy in defendant company was subject to average in like manner as the policy in the Provincial Insurance Company of Canada.

The defendants' policy contained the following conditions:

Condition 4.—"Persons insuring property at this office must give notice of any other insurance already made or which shall hereafter be made elsewhere on the same property on their behalf, and cause a minute or memorandum of such other insurance to be endorsed on their policies; in which case

the company shall only be liable to the payment of a rateable proportion of any loss or damage which may be sustained; and unless such notice be given the insured will not be entitled to any benefit under the policy."

Condition 14.—"It is hereby declared and agreed that in case of the assured holding any other policy in this or any other company on the property insured hereby, subject to the conditions of average, this policy shall be subject to average in like manner; and it is hereby further declared and agreed that in case there be any insurance in any other office extending to the property hereby insured, then this company, in case of loss, will only be liable to pay its rateable proportion of the damage ascertained in accordance with the conditions of this policy."

Plaintiff's policy in the Provincial Insurance Company of Canada was subject to the following condition of average:—

"And in all cases of insurance this company shall be liable only for such rateable proportions of the loss or damage happening to the subject insured as the amount insured by the company shall bear to the whole amount insured thereon without reference to the dates of the different policies."

The following statement of facts was agreed on:—

It is admitted that defendants' policy to plaintiff bears date the 12th of April, 1875, and covered the following:—
Stock and Tools in building and yard to extent of..\$1000 00

In December, 1875, plaintiff effected an insurance to the extent of \$1000.00 with the Provincial Insurance Company of Canada, which was distributed thus:—

On Stock in building.....	\$ 200 00
On Stock in yard.....	700 00
On Tools and Benches in building.....	100 00
	\$1000 00

The loss was appraised as follows:—

Loss on Stock in building.....	\$ 582 60
" " in yard.....	79 75
" Tools in building.....	11 00

Total loss.....\$ 673 35.

Of this defendants have paid into court half—\$336.67.

Plaintiff before action received from the Provincial Insurance Company under his policy \$144.97—leaving unpaid still a balance of \$191.71.

The only question to be considered and determined is whether under the above facts and the following conditions in the policy sued on the plaintiff can recover from defendants the above sum of \$191.71 or any portion thereof, and, if only a portion, what that sum should be.

Henry, Q. C., in support of rule.—We claim that we have paid into court all that we are bound to on the theory that there was another insurance to the same amount on the same property which involved a liability on the part of each to pay half the loss. The difficulty arises entirely from the fact that one policy was distributive and the other not; *26 U. C. Q. B.*, 175.

Borden, contra.—The law in the case cited must be confined to the exact circumstances. The clause in the policy refers only to cases where the amount is insured on the same property and in the same way. The insurance here is not the same and we are entitled to recover the whole amount irrespective of the other insurance; *Howard Insurance Co. v. Scribner*; *2 Bennett's Insurance Cases*, 281; *1 Bennett*, 502; *3 Bennett*, 303; *Bates' Insurance Dig.*, 269, 270, 450, 508; *1 Ontario Appeal Cases*, 545.

McDONALD, J.—We are all of opinion that no cause has been shown for setting the verdict aside. The rule must be discharged.

GRAHAM v. BELL.

Before *McDONALD, C. J.*, and *SMITH and JAMES, J. J.*

(Decided March 31st, 1884.)

Statutes of Elizabeth.—Fraud.—Intent to delay creditors.

M. & Son being in insolvent circumstances, executed a deed of trust for the benefit of such creditors as should join in the deed, whereby they vested all their estate in a trustee, with provisions that the trustee should have a commission of five per cent. on all moneys, and should carry on the business, if deemed expedient, for a period that might extend to three years, using so much of the property as might be necessary for the purpose of replenishing

stock ; that he should sell such portions of the real estate as should be necessary to carry on the business and pay taxes, &c., paying instalments amounting to forty cents in twenty months, and dividing the residue among all the other creditors of the grantors. The Judge, before whom the case was tried, found as to fact that the transfer was intended for the general benefit of creditors, without any fraudulent intent to defeat or delay creditors, and that the provision as to carrying on the business was subsidiary to the winding up of the business in fulfilment of the trusts.

Held, that under this finding, which was justified by the terms of the transfer, the plaintiff was entitled to the goods included in the transfer.

This was an action of replevin brought by plaintiff as assignee, under an assignment for the general benefit of creditors made by W. C. Moir & Co., of Halifax, against the Sheriff of the County of Halifax, to recover certain property levied upon by the Sheriff under a writ of execution issued at the instance of W. Roche, Jr., a creditor of the firm. The material portions of the deed of assignment are set out at length in the judgment of the Court.

The cause was tried at Halifax before SMITH, J., without a jury, who gave a verdict in favor of plaintiff. The cause now came up on a rule *nisi* to set aside the verdict and for a new trial.

Sedgewick, Q. C., in support of rule.—The assignment was for the benefit of such creditors only as should, within a limited time, execute a deed of composition and discharge bearing even date with it. The total amount of liabilities was \$113,000, and the deed was executed by creditors representing \$78,000. Creditors representing \$35,000 refused to sign. Under the trust deed no real estate, which is necessary for carrying on the business, is to be sold under any circumstances. The deed provides for leasing real estate for an indefinite period, thereby putting it out of the hands of the creditors. The business is to be carried on and never wound up. A dividend of 40 cents is to be paid only out of property not necessary for the carrying on of the business, and the profits of the business. No matter how much money the assignee may have, he is only to pay the dividend of 40 cents. The object of the deed is to carry on the business in spite of the creditors, and bring it back ultimately into the hands of the assignor. Every word of the third trust is illegal and fraudulent. The fourth trust is void and the whole deed is void, because it provides for realizing

the whole property, but only for paying the creditors a portion of it. The deed of composition releases the assignor absolutely, on payment of the composition of 40 cents, and a conditional sum of 10 cents in addition. The creditors have no rights against the assignee except under this deed. This alone makes the deed void. The fifth trust provides for payment of creditors who do not execute the deed "out of the residue" of the estate. The word "residue" refers to property not necessary for the carrying on of the business, that being the only property that the assignee is empowered to sell under the third trust. The mere fact of the assignee having a discretion as to the property to be sold, avoids the deed. The corpus of the estate is never to be sold or to pass into the hands of the creditors. This is clearly shown by the fact that the business is to be carried on for three years, while the creditors are to be paid their dividends within twenty-three months. In case all the creditors sign the deed of composition, the whole estate may be at once transferred back to the assignors who may do what they please with it. The power of attorney at the end of the deed of trust gives the trustee no further power than he had previously, as it is expressed, that the power is given "for the purposes aforesaid." The deed delays creditors because: (a) it provides for continuing the business, replenishing stock, and has no provision for winding it up. (b.) the business must be continued until all the trusts are completed. (c.) the available assets to the extent of $59\frac{1}{2}$ per cent., exclusive of realty, are to be paid in instalments amounting only to 40 cents. There are \$27,000 good debts immediately available. This would pay at once 25 per cent. of the total indebtedness of \$113,000. Then there is \$38,700 stock on hand, consisting of bread, biscuit, flour, &c., which is immediately realizable and would give $34\frac{1}{2}$ per cent. further on the indebtedness. This would pay all the creditors at once $59\frac{1}{2}$ per cent. on their claims within three months, without including a cent of realty. The deed binds the creditors to wait two years to get 40 per cent. and a year further for 10 cents additional, making 50 cents in all in three years; whereas, independent of realty, the assignor is in a position to pay every one of his creditors $59\frac{1}{2}$ per

cent. on their claims inside of three months. If all the the creditors signed the deed the assignee would pay in seven month \$9040, whereas at that time he would have \$64,972. In twenty-three months he pays \$45,200, whereas he has in hand \$64,902 of cash assets at that time, with two years interest. What does he do with the difference? Trades with it and makes money at the creditors risk. The whole of the money might be dissipated and the creditors loose it all. The assignee alone under the deed gets as much as all the creditors. The five per cent. on the business for the period during which the business is to be carried on, will amount to \$39,000. Any assignment that permits the assignee to trade with the assets conveyed at the risk of the creditors, is void and cannot be supported. The furthest the law goes is to authorize him to buy for the purpose of winding up the business and not not carrying it on. Secondly, the deed defrauds creditors. It withholds from the creditors a part of the estate. The assignee is prohibited from selling real or personal property required for carrying on the business. That is the corpus of the estate. The warehouse in Halifax, valued at \$75,000, the Bedford Mills \$66,000, the Piers Mill \$6,500, the stock, amounting in all to \$186,700. The total assets, according to the valuation of the assignor, amounted to \$249,000. Of that amount \$186,700 was necessary to carry on the business according to the evidence, leaving a balance of \$62,300. This was encumbered by mortgages and would only realize \$20,000. This was all the property that could be sold or leased to pay creditors. Two-thirds of the estate is reserved and tied up in such a way that the creditors cannot touch it, and it will result to the assignor. (McDONALD, C. J.—When the creditors signing the deed have been paid their dividend, the obligation to carry on the business ceases, the balance of the property, “the residue” then goes to pay the other creditors.) No, the word residue applies wholly to the balance of the property to be sold by the assignee, not necessary to carry on the business, which may remain over after paying the dividend. Otherwise, what would be the meaning of the words “residue, if any.” The word residue cannot apply to the real estate, because, all that

the creditors who sign are to get out of the real estate is ten cents on the dollar. There is not a word in the deed of composition as to the payment of the residue to the creditors. If all the creditors execute the deed the property is to be reconveyed to Moir. In that case the security is gone, as Moir can sell or put the property out of his hands. The creditors are prevented from prosecuting their claims, and in the meantime the property may be made away with. The security for the payment of the dividends is gone. It is a conveyance with a resulting trust in favor of the assignor on payment of half his debts, and with a trust resulting immediately, provided all the creditors join. (*Graham, Q. C.*—The creditors have as much security as before. If the first dividend is not paid the discharge is no answer, and the property is there to meet the demands of creditors.) The assignee is not bound to sell any property at all. He must not sell what is required for the business, of which he is the judge. He need not sell any property he does not deem it expedient to sell, and he may release any property at pleasure. All charges in connection with real estate may be paid out of funds raised from the personal estate, so that at the end of the trust the real estate will go back to the assignor unencumbered. Graham gets five per cent. commission on all money passing through his hands. The receipts of the business are \$250,000 a year, so that in three years he will receive \$37,500. The assignee and the Moirs together, will receive \$53,000. An action of replevin will not lie against a sheriff. As to reservation of a benefit to the assignor cites *Burrill on Assignments*, 168, 172, 178. As to continuance of business, *Ibid*, 180, 187. As to postponement of time for payment, *Ibid*, 188; *Owen v. Body*, 5 A. & E., 28; *Cox v. Heckman*, 8 H. of L., 268.

Graham, Q. C., contra.—Moir's evidence is that had he stopped business and sold out when he made the transfer, the creditors would not have fared as well as they will now. Taking into consideration the indirect liabilities, the fact that the book debts consisted of small amounts scattered over the Province, and the fact that property is liable to depreciate, the creditors would not have fared as well in any other way as

by getting the dividend of fifty cents; and Moir's uncontradicted evidence that the estate would not realize more than that, must be accepted as true. The value of land, buildings, and machinery has largely depreciated. In arriving at the amount to be paid by the assignee, it was assumed that he would carry on business to the same extent and obtain the same credit as Moir, before his insolvency, which is unwarrantable. By the terms of the deed all the trusts are to be executed and accounts rendered within three years. The dividends have to be paid within twenty-three months, and real estate sold within three years. It is not necessary that express power should be given to sell. It is implied from the nature and intention of the conveyance. The property not required for carrying on the business is to be sold, while the business is carried on. The business is to be carried on for a limited time. The fourth and fifth clauses of the deed are the main clauses. The second and third merely provide for carrying on the business. The fourth provides for the payment of dividends; the fifth indicates what they are to be paid out of. Then out of the residue, if any, the assignee is to pay the other creditors. Cites *Burrill on Assignments*, p. 450. Every deed of assignment delays creditors more or less. This deed does not delay creditors within the meaning of the Statute of Elizabeth. The primary object is the distribution of the property among the creditors and the delay is incident to this; 9 C. & P., 640. (JAMES, J.—The simple question is whether the deed is honest and reasonable); *L. R.*, 4 Exch., 107; *L. R.*, 4 Ch. App., 622; 3 M. & S., 371; 5 Exch. Div., 52. In the case of *Owen v. Body*, 5 A. & E., 28, there was no provision, as in this case, for the execution of the trusts within three years, and though the assignee could sell he could go on indefinitely. Cites 9 C. B., N. S., 47; *King v. Watson*, 3 Price, 6; 10 U. C. C. P., 386; 5 Moo. Reps., 19; 9 E. L. & Eq., 481; 18 U. C., Q. B., 113; 6 C. & P., 140. The debtor may be employed in winding up the estate. (*Sedgewick, Q. C.*—We admit that.) Mrs. Moir has given up all her dower to the trustee. As there was a large amount of real estate, to none of which title could be made without the extinguishment of dower, the salary allowed

was not unreasonable. Moir was better able to manage the business than any one else.

Harrington, Q. C., replied.

McDONALD, C. J., (March 31st, 1884,) delivered the judgment of the Court:—

On the 14th September, 1881, William C. Moir and John W. Moir, doing a large business in the City of Halifax as bakers and confectioners, under the name and style of W. C. Moir & Son, being unable to meet their engagements, made an assignment to the plaintiff of all their real and personal estate for the benefit of their creditors. This assignment was assented to, and executed by about three fourths in value of the creditors of the insolvents. Mr. William Roche, Jur., one of the creditors of W. C. Moir & Son, who did not execute the deed of assignment, recovered judgment against the insolvents for the amount of his debt. The defendant, Bell, then Sheriff of Halifax, levied upon property included in, and conveyed by the assignment to the plaintiff, under and by virtue of an execution issued under that judgment; and to an action of replevin brought by plaintiff to recover this property, the defendant set up the defence that the assignment is fraudulent and void under the Statute 13, Elizabeth, chap. 5. The preamble of that act is "for the avoiding and abolishing of feigned, covinous and fraudulent feoffments, &c., as well of lands and tenements as of goods and chattels, &c., devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, &c., not only to the let or hindrance of the due course and execution of law, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man." A conveyance, therefore, to be affected by this act, must be shown to be "feigned, covinous and fraudulent," and made with "*intent to delay, hinder, or defraud creditors.*" PLUMER, Vice-Chancellor, 2 Madd., 247. "A conveyance, therefore, cannot be invalidated by this act, if there has been a *bona fide purchaser.*"—*Do.* And in *Thompson v. Webster*, 4 Drew, 628, Vice-Chancellor KINDERSLEY stated the general

principle thus: "The principle now established is this. The language of the act being, that any conveyance of property is void against creditors if it is made with intent to defeat, hinder or delay creditors, the Court is to decide in each particular case, whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors." And Mr. Justice FRY, now L. J. FRY, in *Golden v. Gillon*, 20 Chan. Div., 392, citing the above passage adds: "It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors among their creditors;—there are other statutes which have that object;—nor is the intent of this statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors." The trusts and conditions of the deed of assignment under which the plaintiff claims are as follows:

First.—To pay and discharge all such lawful charges and expenses as he or they may be put to, or as may have been or may be incurred in relation to these presents and the execution of the trusts herein contained, and also a commission to the said James R. Graham of five per cent upon all moneys which may come into his or their hands.

Second.—Upon trust to conduct and carry on, if he shall deem it expedient so to do, under such name as he shall choose to adopt, the trade and business in which the said William C. Moir and James W. Moir have heretofore been engaged until the completion of the trusts herein expressed and contained, and to use therefor so much of the effects and property hereby assigned as may be necessary for carrying on the said trade and business hereby assigned, and out of the proceeds of the said trade and business and out of the property hereby assigned to replenish, as often as may be necessary, the stock in trade and other effects which may be necessary for carrying on the said trade and business.

Third.—To sell and dispose of, either at public auction or private sale, and in such lots, parcels or quantities as he the said James R. Graham, his heirs, executors, administrators and assigns shall deem expedient from time to time, such portions of the said real and personal property hereby

assigned as may not be necessary for carrying on the said trade and business, and as he or they may deem expedient to sell or dispose of, and also let and lease any part or parts thereof for such time and on such terms as he or they may consider most advantageous, and out of the proceeds of such trade or business and of the property and effects hereby assigned to pay all rates, taxes, charges and expenses, wages, salaries and outlays which may be necessary from time to time in carrying on the said trade and business, including the salary of a competent manager, if the said James R. Graham shall see fit to employ such, and also all such rents, liens, taxes and interest money as may be due or accrue due upon any part of the property hereby assigned which the said Jas. R. Graham, his heirs, executors, administrators or assigns may deem it beneficial for the purposes of the trust estate to redeem or to hold.

Fourth.—To pay all such creditors as shall have executed within three months from the date thereof a deed of composition between the said William C. Moir and James W. Moir, and their several and respective creditors, a composition of forty cents on the dollar of their respective claims, in the manner and at the times following—eight cents on the dollar in four months from the date of the execution of said deed of composition, a further instalment of eight cents on the dollar in four months from the date when said first instalment shall fall due, a further instalment of eight cents on the dollar in eight months from the date when said first instalment shall fall due, a further instalment of eight cents on the dollar in twelve months from the date when the said first instalment shall fall due, and a final instalment of eight cents on the dollar in sixteen months from the date when said first instalment shall fall due; and further, that if after payment of all the charges on the real estate hereinbefore conveyed, and the payment of all such sums of money as may lawfully be paid under this deed in trust to the said James R. Graham in the management of such real estate, and in fully carrying out the provisions of this deed in trust, the said real estate shall yield a surplus over and above such charges and payments in such case, for and on behalf of the said William C.

Moir and James W. Moir, to pay to the said creditors such surplus to the extent of ten cents on the dollar of their several and respective claims in addition to the aforesaid instalments.

Fifth.—After the payment of said dividends to said creditors who shall have executed within three months from the date hereof, the said deed of composition in manner and form as therein provided, he shall, out of the residue, if any, pay in equal proportions the respective claims of all the creditors of the said William C. Moir and James W. Moir, or either of them, including those creditors who shall have executed said deed within three months from the date thereof said dividends paid or to be paid to them respectively under said composition deed.

Provided always, and it is hereby declared and agreed that the said James R. Graham shall keep separate accounts in connection with the land and real estate hereby assigned, and the said dividend of ten cents on the dollar shall only be paid out of the surplus arising therefrom after paying off and discharging the following charges, that is to say: all liens and mortgages existing thereon and principal and interest money secured thereby and all the rates, assessments and taxes which the said William C. Moir and James W. Moir, or either of them, have been assessed for or charged with in respect to said lands and real estate or any part thereof, or which have been imposed thereon, together with the rates, assessments and taxes payable in respect thereof by said James R. Graham as said trustee, or which shall become payable in respect thereof during these trusts and the costs and charge of repairing, maintaining and keeping the said lands and real estate in good and substantial repair; all costs and charges necessary for keeping the same insured against loss by fire; all costs, charges and commissions in connection with the management thereof and all other necessary and proper charges now existing or which may hereafter during these trusts exist against the same, all of which charges hereinbefore specified shall be first satisfied and paid out of the said lands and real estate and every part thereof, irrespective of that lot or portion of said lands and real estate

against which such charges may exist and said dividend to be paid. And there shall be charged against the said real estate account all such sums as the said William C. Moir and James W. Moir or James R. Graham, or either of them, may be called on to pay by reason of any debts due in respect of said real estate or any part thereof, or any debts secured upon said real estate or any part thereof.

And it is hereby stipulated and provided that in case all the creditors of the said William C. Moir and James W. Moir, or either of them, have executed the said deed of composition or any other release, to the said William C. Moir and James W. Moir, then the said James R. Graham shall re-convey to the said William C. Moir and James W. Moir, or whichever of them may have held the same prior to the execution of these presents, all the property hereby conveyed by the said William C. Moir and James W. Moir, paying to the said creditors the composition payments secured by the deed of composition, and the said James R. Graham shall then account to the said William C. Moir and James W. Moir in relation to all the trust property hereby conveyed and assigned.

And it is further declared to be the true intent and meaning of these presents that the amount to be paid to any creditor under the said deed of composition, or under this deed, shall not exceed in any case the full amount of the debt due by the said William C. Moir and James W. Moir, or either of them, to such creditor, and also that the said James R. Graham shall execute all the trusts herein expressed and be prepared to render a full account of the execution of the same within three years of the date hereof.

The cause was tried before my brother SMITH, without a jury, at the sittings in Halifax, May, 1882, when that learned Judge found for the plaintiff, and, on the question of fact as to the *bona fides* of the insolvents and the plaintiff assignee in connection with such assignment, reported as follows :— I am of opinion that the transfer was intended for the general benefit of the creditors of the insolvents without any fraudulent intent on behalf of the assignors to defeat or delay their creditors, and that the provision in the deed of assignment providing for carrying on the business by the plaintiff in

the manner prescribed by the deed of transfer was subsidiary to the winding up of the business in fulfilment of the trusts. I have, in this view of the case, decided that the verdict should be for the plaintiff, although I am not without some doubt in looking at the cases cited as to the legal effect of the instrument upon the rights of creditors and under the statute referred to."

It was strongly contended at the argument by the learned counsel who argued for the defendant that sufficient appears upon the face of the deed and in the character of the trusts created by it to oblige the court to declare it void under the statute, and that contention was formulated into the following propositions:—

1. The creditors are delayed by the business being continued and the stock being replenished from the estate, while no provision is made for winding up the business:

(a.) Because the business must be continued till all the trusts in the deed are executed.

(b.) Because the dividend proposed to be paid to the creditors is too small in view of the assets available to meet liabilities.

(c.) Because the compensation provided for the assignee is exorbitant and fraudulent.

(d.) Because the assignee is permitted to trade with the property of the estate, and because the non-assenting creditors must wait for three years for a dividend.

2. The deed defrauds the creditors because it withholds from them a part of the estate:

(a.) The assignee is prohibited from selling any part of the property necessary for carrying on the business, and that property comprises the main portion of the estate, and a substantial part of the estate is thus withdrawn from its legitimate and legal purposes.

3. The deed does not provide for the disposition of the residue of the estate after payment of the dividends provided for in clause four of the trusts.

A short analysis of the deed and its provisions will enable us to determine how far the above propositions can be

sustained,—and to that end let us see what the provisions of the deed, and the trusts created by it, really are, first noting that it is admitted on all sides that all the property of the insolvents, real and personal, is included in the assignment.

The trusts are :

1. To pay all charges and expenses in connection with the discharge of the trusts, and a commission to the assignee “of five per cent upon all moneys which may come to his or their hands.”

2. To carry on the business, if he shall consider such a course expedient, until the completion of the trusts, and to use so much of the property for the purpose of replenishing the stock, as may be necessary.

3. To sell and dispose of such portions of the real and personal property as may not be necessary for carrying on the business, to pay taxes, rents, &c.

4. To pay the executing creditors 40 cents on the dollar as follows : 8 cents in 4 months from the date of the execution of the deed ; 8 cents in 4 months from the date when the first dividend shall become due ; 8 cents in 8 months from the same date ; 8 cents in 12 months from the same date, and 8 cents in 16 months from same date—in all 40 cents in twenty months from the execution of the deed of assignment.

5. After payment of the above dividends to the assenting creditors he shall, “*out of the residue*,” if any, pay in equal proportions the respective claims of “*all the creditors*” including the assenting creditors, for the balance of their debt above the 40 cents in the dollar. It is also agreed that the assignee shall keep a separate account of the real estate, and should that part of the estate, after payment of the 40 cents to the assenting creditors, and the costs and charges incident to the management, sale and care of the real estate, as distinct from the personal property produce a sufficient sum for that purpose, then a further preferential dividend of ten per cent shall be paid the assenting creditors out of that fund ; and finally, that the assignee shall execute all the trusts and stipulations undertaken by him in three years from the date of the deed.

What is there then on the face of this deed, thus succinctly but fairly stated, indicating any intent on the part of these insolvents to hinder, defraud, or delay their creditors? They have a legal right to prefer their creditors, and, if so advised, to pay one or more in full, before the others are paid a dollar. The learned Judge who tried the cause found, as matter of fact, "that the transfer was intended for the general benefit of the creditors of the insolvents, without any fraudulent intent on behalf of the assignors to defeat or delay their creditors, and that the provision in the deed of assignment providing for the carrying on the business by the plaintiff in the manner prescribed by the deed of transfer was subsidiary to the winding up of the business in fulfilment of the trusts." In my opinion the evidence fully sustains that finding, and I have failed to discover any provision in the deed which, fairly construed, can be held to conflict with that view. In *James v. Whillreod*, 11 C. B., 406, the assignment contained a clause empowering the assignee to employ the grantor "or any other person or persons in winding up the affairs of the assignor and in collecting and getting in his estate and effects thereby assigned, and in carrying on his trade, if thought expedient by him." And JARVIS, C. J., contrasting the deed then under consideration with that in *Owen v. Body*, 5 A. & E., 28, said: "Upon examining that case I am of opinion that it is not applicable to the present, for there the deed contained minute provisions investing the trustees with power to carry on the trade, for which purpose they were empowered to lay out money in payment of rent, &c., and in keeping up the stock, and the Court held the deed void as being one which the creditors could not reasonably become parties to. Here, however, the deed contemplates the sale of property and the winding up of the business, and the power given to the trustee to carry on the trade was evidently intended to be merely subsidiary to the winding up of the concern. Unless, therefore, every deed of assignment for the benefit of creditors is to be held void, I think, for the reasons given by my brother MAULE, in the course of the argument that this deed is not void." And MAULE, J., in the same case said: "The main object of the deed in that case, (*Owen v. Body*,) was the carry-

ing on of the business for the purpose of making money to pay the creditors who became parties to the deed. Here the object merely is to wind up the concern ; that is a clear, plain, and intelligible distinction." In the case under consideration the trustee is authorized to sell and dispose of the real and personal property, and is compelled by the terms of the deed to sell so much thereof within the respective periods of 4, 8, 12, 16 and 20 months as shall be sufficient to pay the respective instalments of the 40 per cent dividend to the assenting creditors, and he is also obliged by the terms of the deed to complete his trusts and close up the concern at the end of three years. Surely this brings this case entirely within both the spirit and the terms of the decision in *James v. Whillreod*. Counsel for defendant contended that the period of three years allowed for winding up the estate was unreasonable, and that the non-assenting creditors were thus hindered and delayed in their ordinary legal remedies for recovering their debts. That may be true, but delay is a necessary incident of the insolvency of the assignors and the settlement of the estate, and as the Statute of Elizabeth does not, as before stated, contemplate an equal distribution of the estate among the creditors, delay or hindrance to the non-assenting creditors is not a wrong within the purview of the act, if, in point of fact, the transaction on the whole is a *bona fide* disposition of the property for the benefit of creditors.

In *Alton v. Harrison*, L. R., 4 Ch. App. 624, it was argued by counsel that the deed then under discussion "would clearly have been an act of bankruptcy under the act, if a petition had been filed by the excluded creditors. The words in that section of the act are nearly identical with those in the statute of Elizabeth, and, as the deed would have been void in bankruptcy, it follows that it is fraudulent against creditors under the statute of Elizabeth." But Lord Justice CLIFFORD said: "The objects of the two statutes are different. The bankrupt laws are for obtaining an equal distribution of the assets ; the statute of Elizabeth had no such object." And in giving the judgment of the Court of Appeal in that case the same learned Judge said: "There can be no doubt that Harrison executed this deed at a time when he knew a writ

of sequestration would be issued against him. But at the same time there can be no question that the law was laid down by the Vice-Chancellor in his judgment quite accurately with a long course of authorities, when his Honor said: "In this as in all other cases of the same kind, the question is as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted to for his own personal benefit, it is not void but must have effect." Again he says: "I have no hesitation in saying that it makes no difference in regard to the statute of Elizabeth whether the deed deals with the whole or a part of the grantor's property. If the deed is *bona fide*, that is, if it is not a mere cloak for retaining a benefit to the grantor, it is a good deed under the statute of Elizabeth." See also *Bolders v. London and Westminster Loan Company*, 5 Exch. Div., 47, and *In re Johnston*; *Golden v. Gillan*, 20 Ch. D., 396.

FRY, J., said.—"It appears plain from the case of *Holmes v. Penney*, 3 K. & J., 90, that the mere fact of a *bona fide* creditor being defeated is not of itself sufficient to set aside a deed for valuable consideration. In this case if I uphold the deed it seems probable that the plaintiff will have no remedy in respect of his debt. In that case, by upholding the deed, the plaintiff was excluded from all remedy in respect of his debt, and that debt must have been plainly present to the mind of the settlor, but the Vice-Chancellor thought that the only object of the brother was to make an honest family arrangement with regard to it; so it appears to me in the present case that the object of the mother and daughter was to make an honest family settlement of the property." And the same learned Judge proceeds thus: "Then again it is said with respect to many creditors who are included in the covenant, they are defeated and delayed, because, before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But this is the result of almost any dealing." Being of opinion then with the learned Judge who tried the cause, that the deed in question was executed *bona fide* for the benefit of the creditors of the

grantor, and that the authority to carry on the business for a limited time was subsidiary only to the winding up of the estate; and being further of opinion that the period of time for closing up so large a business,—three years,—was not unreasonable, and that none of the provisions or trusts contained in the deed are of a character to prevent the creditors of the insolvents from receiving the full value of the entire assets of the estate within the time specified in the trust or within a reasonable time thereafter, I concur in the verdict of the learned Judge and think it ought to be sustained. Exception was taken to the clause stipulating that all the property should be transferred to the grantor, should all the creditors, by executing the assignment, release their respective debts. I may have misunderstood the nature of the objection, but I am at a loss to understand what other disposition could be made of the property in such an event. The several creditors were free to sign or refuse to do so; if they all voluntarily executed the release upon such security as they chose to accept, the assets from which the debts were to be realized, would, it seems to me, go back to the grantors as a matter of course. It was also contended that the compensation stipulated to be paid to the trustee was exorbitant. We have no means, I apprehend, of dealing with that question, but the whole dealings of this trustee with the trust property are subject to the controlling review of the proper tribunal at the instance of any party interested. For the reasons given I am of opinion that the rule *nisi* to set aside the judgment for the plaintiff should be discharged with costs.

ATTORNEY-GENERAL, ON THE RELATION OF
DICKIE ET AL. v. AXFORD ET AL.

Before McDONALD, SMITH, JAMES, and WEATHERBE, J.J.

(Decided March 31st, 1884.)

School lands. Disposal thereof after Free School system established.

DEFENDANTS were trustees of school lands in the Township of Cornwallis, the terms of the trust being that the lands should be held "in special trust to and for the use of one or more schools, as might be deemed necessary by the trustees, for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all the schools in the said township furnished or supplied with masters qualified agreeably to the laws of the Province and contracted with for a term of not less than a whole year, should be entitled to an equal share of the rents and profits arising from said school lands, provided the masters or teachers thereof should receive and instruct, free of expense, such poor children as might be sent there by the said trustees." In 1878 all the schools of the Province were made free, and the object of the trust having failed, the funds were allowed to accumulate until 1879, when the defendants were about to appropriate the moneys to the erection of a school house in one of the sections of the township. A suit having been brought in Equity praying *inter alia* that the defendants might be decreed to divide the moneys equally among all the schools in the township, and that an injunction might issue to restrain them from applying the same or any part thereof to the erection or support of the proposed school house, the injunction asked for was granted on the ground that the proposed expenditure was in violation of the trust.

Held, on appeal, that the plaintiffs were not entitled to the decree and distribution for which the suit was brought.

Per JAMES, J., dissenting, that the bill should be sustained and its prayer granted for an accounting with an injunction.

This was a suit in Equity brought by the Attorney-General on the relation on a number of the inhabitants and rate-payers of the Township of Cornwallis against the Rector and Churchwardens of the Church of St. John, in the said township, praying for an account of all money received by the defendants from the rents and profits of lands held by them in trust for school purposes in the Township of Cornwallis, and that the defendants might be decreed to divide such moneys equally among all the schools in the township, and pay the same over to the school trustees of each school section, and that in the meantime an injunction might issue to restrain them from applying the same or any part thereof to or for the erection or support of any school house in section sixty-one.

The cause originally came before the Court on appeal from the judgment of RITCHIE, E. J., granting the injunction prayed for. The judgment referred to was as follows:—

These proceedings have been instituted in the name of Mr. Thompson, the Attorney-General of Nova Scotia, on the relation of David M. Dickie and others, on behalf of themselves and the rest of the inhabitants and rate-payers of the Township of Cornwallis, against the Rev. Frederick J. Axford and William Smith and Henry Zinck, the Rector and Churchwardens of the Church of St. John in that township. In the writ it is alleged that in the grant of the township, dated the 21st July, 1761, a certain portion of the land of the township was granted and set apart for school purposes, which was by an act of the Legislature, passed in June, 1766, vested in trustees for the use and support of schools, and in August following trustees were appointed for such purpose, and the land was held by them and their successors in trust for the schools of the township.

That in 1796 the school lands in the township were by letters patent, under the Great Seal of the Province, granted to the Rev. William Twining, John Burbidge, and Benjamin Belcher, the then Rector and Wardens of the Church of St. John, and the Rector and Wardens of that Church for the time being, in special trust for the use of the school or schools in Cornwallis, to have and to hold during their continuance in the said offices respectively, to the Rector and Wardens of the said church for the time being, in special trust to and for the use of one or more school or schools as might be deemed necessary by the said trustees for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in the said township furnished or supplied with masters qualified agreeably to the laws of the Province, and contracted with for a term not less than a whole year, should be entitled to an equal share or portion of the rents and profits arising from said school lands, provided the masters or teachers thereof should receive and instruct, free of expense, such poor children as might be sent there by the said trustees; and the Rector and Wardens entered into possession of the lands described in the writ, and have managed them and acted as such trustees to the present time. That the Township of Cornwallis is about twenty-five miles in length and twelve miles in width, and schools were established

in different parts of it for the benefit and convenience of all the inhabitants, the masters of which instructed such poor children as were sent to them from time to time, and the rents and profits of the lands were divided annually by the trustees equally among all the schools, the masters of which complied with the terms required until about 1873, after which all the schools having become free the trustees refused and neglected to apply the rents and profits arising from them, (which amounted to about \$350 annually) for the use of the schools of the township, and allowed the same to accumulate, so that, when the defendants became trustees in 1879, they received from their predecessors the sum of \$1218, who are about to or have appropriated this accumulation to the erection of a school house in School Section No. 61, in the township, which will be of no benefit or convenience to the general inhabitants of the township, and on land which does not belong to the trust or the trustees of the school section, so that all money expended thereon will be lost to the trust; that there are now schools in the township in which all poor scholars are instructed free of expense, the masters of which are duly qualified and contracted with for a term of not less than a whole year, but the defendants refuse to divide the rents and profits of these lands among them.

In their answer the defendants admit the issue of the letters patent to the Rev. William Twining, the Rector of the Church of St. John, and John Burbridge and Benjamin Belcher, Wardens of that church, but they submit that the estate given by the grant was for their joint lives only, and that the said three trustees departed this life many years ago, and long previous to the possession by the defendants of the lands and money referred to, and they admit that since they became such Rector and Churchwardens they have been in possession of all the lands described in the plaintiffs' writ, except three lots which they specify, which have never been in their possession or that of their predecessors; that the land of which they are in possession was received by them from their predecessors in their several offices, from whom they also received the sum of \$1249.07 as accumulations of the rents and profits, but that the net annual income from

them does not exceed \$250. They believe it to be true that their predecessors annually divided among the schools in the township such portion of the rents and profits of the lands as were not used in improving the same until the present system of free school education was introduced by legislation, after which the schools became so numerous that the sum each would receive would be so small as to be of no practical use. The defendants admit that they have appropriated the money received by them to the erection of a school house in School Section No. 61, but they deny that it would not be of any benefit to the general inhabitants of the township, or that the money so expended will be lost, and they insist that in exercising the discretion of building the school house and providing a teacher therefor, open to all the inhabitants of the township who may resort thereto, they are fulfilling the spirit of the alleged trust; and they further allege that under the statements in the writ the plaintiff is not entitled to relief in this Court, and if so not the relief sought, and that the suit could not properly be instituted by the Attorney-General of Nova Scotia; that if such a suit could be maintained it could only be legally instituted by the Attorney-General of Canada.

The case is not very much varied by the evidence. Mr. Axford says that the trustees of the school lands propose to obtain a lease of the land from the Rector and Churchwardens, on which they have commenced to erect the school house. He admits that neither the vestry nor parishioners have agreed or consented that such lease should be given, that a portion of the trust funds, about \$200, was applied to schools in School District No. 61, under the control of the district school trustees, about six children attending the school from other districts who were charged for. The books show that five were so charged for. He admits that it is about twenty miles from that school west to the end of the township, and practically that the school is only available for children of that district and those near it. He went to the parish in June, 1879, and was inducted in August following. There are about sixty school sections in the Township of Cornwallis.

The school house that the trustees, the defendants, were erecting was to cost \$1,300 and was intended to be a public

school open to all and not in any respect for the private use of the parish. Mr. Axford produced three books relating to these lands and the division of the proceeds of them, viz.: a record book commencing in 1802, and two account books.

Mr. Robert Starr was also examined.—He stated that he was a churchwarden and trustee of school lands previous to the appointment of Smith and Zinck, and when he went out of office he delivered the books to the present trustees. As trustee he distributed the funds arising from the lands by paying a dividend to all the teachers in the township, who put in a certificate from the trustees of their sections that they had taught according to the law, being yearly teachers. After 1872 he stopped making these payments. The record book in evidence commenced in 1802, on the appointment of new churchwardens, the offices having become vacant by the resignation of John Burbidge and the death of Benjamin Belcher, and in 1806, the Rev. Mr. Twining having removed to another parish, the Rev. Mr. Norris was inducted in his stead, and he and all succeeding rectors as well as churchwardens, as they were from time to time appointed, assumed the duties of trustees and applied the proceeds of the lands in strict accordance with the terms of the trust.

By the grant of 1761 of the Township of Cornwallis, the lands intended for schools were reserved for that purpose rather than granted. It is unnecessary, however, to go beyond the grant of 1790, as on the passing of that grant the parties to whom the land was then granted entered into possession and accepted the trust conferred upon them with the acquiescence of the other grantees, the inhabitants of the township, as have their successors in the respective offices of rector and churchwardens of St. John Church from time to time, and all that is now required of the present defendants is that they, being in possession of the land, will carry out the trust as expressed in the grant.

The defendants are wrong in assuming that the parties named in the grant as trustees took a life estate in the land, for they were to hold it no longer than their tenure of office; but, whether they had an estate for life or while they remained in office, the present defendants could claim no title

through them, the rector and churchwardens not being a corporate body. But however imperfect their legal title, it would not necessarily affect the rights of the *cestui que trust*. Their interest in the land was not to be confined to the time during which the first trustees held office; that appears expressly from the terms of the grant; and it is a principle well recognized in equity that a trust which has been explicitly created shall never fail from want of a trustee, whether the trustee named was an improper or incapable one, or had died, or refused to act. The lapse of the legal estate has no influence on the trust, and as the persons named as trustees are only instruments to execute the trust, this Court will supply the want or failure of a trustee. See *Spence's Equity Jurisdiction*, 1st vol., 501, 2nd vol. 51, 576, and if in this case, in consequence of the parties named in the grant as trustees not being a corporate body so that the title could vest in their successors, the legal title should be held to revert to the Crown, it would revert subject to the trust created by the Crown, and Equity would still follow the property and execute the trust by the appointment of new trustees, as where the legal title of land clothed with a trust escheats to the Crown from the failure of heirs to the trustees; (see *Hughes & Wells*, 9 Hare, 749); for property charged with a trust, will, in equity, be followed into the hands of whomsoever it comes unless he is a purchaser for value without notice, and these defendants having gone into possession of the land in question knowing of the trust and in the character of trustees, whether they have a good title or not, will as regards the *cestui que trust* be deemed trustees *de facto* and as an imperfectly appointed trustee in one case was termed a trustee *de son tort*.

As these defendants received the land from their predecessors who, while in office, had always recognized and carried out the trust, they could only accept it subject to the trust or repudiate all connection with the property. Their only defence now can be that the course they were pursuing with respect to it was justified by the terms of the trust, and this involves the simple question whether the benefit intended to be conferred by the Crown was to be enjoyed by the inhabitants of the whole Township of Cornwallis, or whether the defend-

ants have a discretionary power of conferring it on one school section of the township, and, with the funds in their hands as trustees, erecting a school house on lands not belonging to the section or the township ?

The terms of the grant are, in my opinion, so explicit as to preclude any other inference than that all the schools in the township were to participate in the benefit conferred which were supplied with masters legally qualified who were engaged for a period not less than one year, and who should instruct poor children sent there by the trustees ; all such were entitled as of right to an equal share of the rents and profits arising from the lands ; had the terms of the grant been less explicit the natural inference would have been that, when the whole lands of the township were parted with by the Crown to the inhabitants, a portion of which was reserved for education, the benefit was intended for all of the inhabitants, and, from the passing of the grant of 1796 to 1872, those who acted as trustees under it, the rector and churchwardens of the Church of St. John for the time being, exercised no discretion in the matter, but simply carried out the trust in its terms, and in my opinion they pursued the only legal course open to them.

Free schools were established in the Province in the year 1865, after which, for six or seven years, the rents and profits of the land were distributed among the teachers as theretofore, the only reason for their ceasing to make the distribution, given by the defendants, is that the amount to each would be too small to be of any use. The new system introduced by the legislature involved the levying of an assessment upon the inhabitants of the several school sections of the township for the erection of school houses and the payment of teachers, and the distribution in the terms of the grant was as applicable after as before the change, and was felt to be so by the trustees up to 1872, and, as no discretion was given them by the terms of the trust, they were not justified, for the reason they have assigned, not only to cease to make a division of the money as directed, but to apply it otherwise than they were authorized by the grant, and, if they had a discretion given them of disposing of the money as they should see fit

for the benefit of the inhabitants of the township, the exercise of it in the mode proposed would be a most unfair appropriation in expending what was intended for the whole township in the erection of a school house in one section of the township, and that a populous and wealthy one, leaving the other sections of the township to erect their school houses from their own funds, and I cannot think that the defendants would have exercised sound judgment in expending the trust fund on a building erected on land belonging to the parish of St. John's Church, of which the school section or the trustees had no title nor any certainty of obtaining one; but in the view I have taken of the case this is unimportant; on the other ground I think the defendants should be restrained from expending the money in their hands arising from the rents and profits of the lands in question, otherwise than as expressed in the grant, and that the mode they proposed to expend them in, the erection of the school house in section 61, is in violation of the trust. It remains to be considered whether the proceedings in this case have been properly instituted by the Attorney-General of Nova Scotia. I can see no ground for the contention that the only person who could institute them was the Attorney-General of Canada. The office of Attorney-General for the Province of Nova Scotia is expressly recognized in the British North America Act, and the constitution of the executive authority in the Province was to continue as it existed at the Union, until altered by that act or under its provisions, and the whole subject matter of the suit is of a local nature, so that it appears to me that it would be out of place for the Attorney-General of Canada to interfere in a case like this. The recognition of such an officer as the Attorney-General of Nova Scotia in the British North America Act assumes that he is at least in certain cases to represent Her Majesty; he is recognized as representing her in criminal proceedings, over which the Dominion Parliament has legislative control; surely in matters of a purely local nature, and in relation to lands of the Province which belong to the Province, though held in the name of the Crown, over which the Local Legislature has control, if in any case that officer is to represent Her Majesty

it is in such as this ; though a provincial he is still a Crown officer with power to act on behalf of the Crown in all provincial matters requiring the intervention of a Crown officer.

With reference to the trust I may add, that if, in the opinion of the trustees, the trust from altered circumstances could not be carried out in its terms, they could have applied to this Court to authorize a mode of disposing of the trust fund so as to carry out as nearly as possible the intention of the grantor.

The appeal was argued January 24th, 1882, before a Division Court, composed of SMITH, JAMES and WEATHERBE, J. J.

WEATHERBE, J., (July 14th, 1883,) delivered judgment as follows :—

The following are the words describing the trust :—"To have and to hold the said parcel, lot, or tract of four hundred acres of land, and all and singular other premises hereby granted unto the said William Twining, Rector of the said Church of Saint John, and John Burbidge and Benjamin Belcher, Wardens thereof, during their continuance in the said offices respectively, and to the Rector and Wardens of said Church of Saint John for the time being, in special trust to and for the use of one or more school and schools as may be deemed necessary by the said trustees for the convenience and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in said township, furnished or supplied with masters qualified agreeable to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees."

Assuming the defendants are not to escape liability, by reason of defect of legal title and that the trust has been properly created and cannot fail, and that though the Court may be obliged to follow the property to execute the trust by the appointment of new trustees, these defendants cannot be heard to say they are to be relieved on that ground, a very

important question remains to be determined to sustain the judgment appealed from. The learned Judge below says:—"The terms of the grant are, in my opinion, so explicit as to preclude any other inference than that all the schools in the township were to participate in the benefit conferred, which were supplied with masters legally qualified, who were engaged for a period not less than one year, and who should instruct poor children *sent there by the trustees*—all such were entitled as of right to an equal share of the rents and profits arising from the lands." It may be impossible to controvert this proposition, because it is very nearly in the words of the grant. This proposition, upon which the judgment is founded, repeats the disputed words which have been submitted to the Court for construction. The proposition is nothing more than this:—The trustees are required to make an equal distribution among all the schools which shall instruct poor children sent there by the trustees. The language of the grant requires to be carefully noted:—"Provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees." All such, according to the judgment appealed from, were entitled as of right to an equal share. The learned Judge below goes on to say that down to the year 1872 the trustees exercised no discretion in dividing the rents and profits equally among all the schools in the township, but simply carried out the trust in its terms, and thus, in his opinion, pursued the only legal course open to them. And this judgment upon the bill claiming an equal division for all the schools in the township is supported, not upon the ground of *cy pres*, but on the ground, as I understand it, of the necessary construction of the words of the grant above quoted. I understand by the bill and the evidence that an equal division of these rents and profits is demanded from the defendants among all the free schools in the township without exception, and without any limitation or qualification. To say the least of it a violation of the trust would, I should think, be admitted, were the trustees to pay any share towards a school supplied with masters, contracted with for a term less than a whole year. Language could not be plainer than that which imposes this limitation. And yet

it does not appear by the bill or the evidence that any of the schools for which a share of these rents is demanded were qualified to receive it. We cannot assume, I think, that they were all, or that any of them were qualified. To allow the appeal, however, on this ground alone, even if sufficient, would, perhaps, not be promotive of the just administration of the law, and the case might, after some delay, if such requisite proof as is now wanting could be supplied, again find its way to this Court. One fallacy, I think, of the contention on the part of plaintiff is that the trustees were entrusted with no discretion whatever. The judgment appealed from has gone upon the success below of that contention. The equal division of rents and profits mentioned in the grant depends certainly upon the instruction of poor children in any school for which a share can be claimed. The school shall be entitled to an equal share provided—these are the words which seem to have been overlooked—the masters should instruct, “free of expense, such poor children as might be sent.” * * * This charity seems to have been a provision to pay for the education of a class—the poor. How, if this is so, can it be claimed for all schools indiscriminately? For I do not understand from plaintiffs that high schools or classical academies are to be included. The rents are to be paid to no schools, I should say, if language means anything, except where poor children are to be received and taught free of expense. And we are told that the trustees are to have no discretion. Could it have been contemplated, when this trust was created, that possibly a share of these rents might be demanded where children were taught free of expense who were not really “poor”? I will not say; but this I will venture to say, that the language of this grant is so clear as to put beyond doubt any question of the kind. “Provided the masters or teachers should receive and instruct, free of expense, such poor children as might be sent there by the said trustees.” I cannot help thinking that under these words, at any rate, of the grant, a very important discretion in the trustees is necessarily involved. There is a trust for the purpose of paying for the tuition of such poor children as should be sent to the schools by the trustees. Were they obliged to send poor scholars to

every school? I think it would be absurd to say so from these words. In some sections there might be no scholars who would accept of the charity, or who could be persuaded to go to school, or there might be no poor in the section. It would lead to endless questions if a discretion were not to be exercised by the trustees.

If the clause describing this trust is carefully examined it will be found to consist of two distinct parts, and provide for two distinct objects. I am led to think, in reflecting upon the state of things in 1796, that the then state of education, as well as the fund, and the probable future condition of the country, and the growth of the revenue were in contemplation. It seems to have escaped attention that the first mentioned object of the trust in question, is described by different words from the second. To have and to hold the said lands, &c. :

1. In special trust to and for the use of one or more school and schools, as may be deemed necessary by the said trustees, for the conveniency and benefit of all the inhabitants of the Township of Cornwallis ; and,

2. In trust that all schools in said township furnished or supplied with masters qualified agreeably to the laws of the Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof, shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees.

Counsel at the argument, on both sides, seemed to agree that this language, which I have taken the liberty to separate, was to be read together, and this seems to be the view adopted in the judgment appealed from. Confusion appears to me to result from the attempt to read the language as if the trust involved only one object. By separating the passage two different things are presented to us, as the ultimate mode of disposal of the trust funds.

I will first look at the matter as it was before our free school law. This Court could not interfere to compel the attendance of poor children at any school, and, in the absence of poor children, the trustees could use the whole rents, under

and by virtue of the first specified object in the trust, and I cannot understand that these words are not sufficiently comprehensive to authorize the building of school houses. It appears to me that it was the original intention, that they should, if they thought it proper, do so.

Notwithstanding the view which I have taken, I still can appreciate one view which may be urged as to the condition attached by the proviso to the second named object of this charity. Although it was not urged, I yet perhaps should say that it has occurred to me that it might be urged that the proviso was added to give power to the trustees if they should see fit to send poor children to any school, and the money was to be divided among all otherwise qualified who should be willing to receive and instruct, free of expense, all poor children who might be sent by the trustees. If this should be the correct view of the meaning, I still think the defendants must succeed under the contention to be found in their answer that this application, in any event, should have been for relief under *cy pres*. This view also seems not to have been without weight with the learned Judge in Equity who lays stress upon the class of cases where the literal execution of the trust becomes impracticable and the Court will not refuse to sustain it but will adopt a scheme to execute it as nearly as may be according to the original purpose. The question raised cannot be said to be free from difficulty, but, though not without doubt, I have come to the conclusion that the appeal should be sustained.

SMITH, J., concurred.

JAMES, J., dissented.

In consequence of the division of opinion on the Bench, the appeal was re-argued January 7th, 1884, before the full Court by *Ritchie, Q. C.*, in support of appeal, and *Henry, Q. C.*, contra.

MCDONALD, J., (March 31st., 1884,) delivered judgment as follows:—

If I could read the words describing the trust in question as did the learned Judge in Equity, whose decision is appealed

from, I would probably agree with him in his conclusion, but I find it impossible to do so. The words used are "in special trust to and for the use of *one* or *more* school or schools, as may be deemed necessary by said trustees for the convenience and benefit of all the inhabitants of the said Township of Cornwallis; and in trust that all the schools in said township furnished or supplied with masters qualified agreeably to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent to them by the said trustees." Before the act was passed establishing free schools in this Province, the tuition of children, at the common schools, was paid for by their parents or friends; such tuition fees being supplemented by an allowance to each school out of the Government grant, and, unless so paid for, many of the children, not being absolute paupers, would not be taught at all; and the grant here in question was, to my mind, clearly intended to assist in the education of that class of children, by enabling the trustees to appropriate the rents and profits to the use of *one* or *more* school or schools, as might be deemed necessary by them; or to send the children to any legally authorized school in the township, as in their discretion they might think proper,—paying for their tuition when they thought the parents were unable to do so. It is impossible for me to read the words of this trust as meaning, either before or after the establishment of free schools, that the funds in question should be indiscriminately distributed among all the schools of the township. Since the passing of the present act there are no poor children in this Province, within the meaning of the trust, to be sent to the established schools. The children of the poor are as rich, in that respect, as those of the wealthy,—having reference only to the common schools; and the condition upon which the trustees were authorized to allow any of the schools to participate in the benefits of the fund, viz.,—"provided the masters or teachers receive and instruct, free of expense, such poor children as may be sent them," is not now capable of being

fulfilled, and probably never will be again. It seems to me clear that a discretion was given to the trustees to use the rents and profits for the benefit of one school or more, as they might think fit, provided, always, that the conditions were complied with, if any of the district schools were utilized to have the poor children taught in it. The object of the trust being, as I think it was, to provide means for educating the poor, it seems to me unquestionable that when the words, so much relied upon by the plaintiff, "for the conveniency and benefit of all the inhabitants," were used, they did not mean all the rich inhabitants, or all the rich and poor together, but all the inhabitants whose condition in life was, or might become, such as to bring them within the scope of the charity. Any other reading of that phrase would be inconsistent with the power just previously given to the trustees to apply the funds to the use of one or more school or schools at their discretion, and would, also, be inconsistent with the proviso that, to entitle any of the established schools to a share of the funds, the masters or teachers should receive and instruct, free of expense, such poor children as might be sent them by the trustees. In the changed condition of the law it is, no doubt, somewhat difficult to say how the trustees should exercise their discretion, but that is not the question now before us. The plaintiffs ask that the defendants be "decreed to divide the same," (the funds) "equally among the schools in the said township, and pay the same over to the school trustees of each school section," etc.; and I cannot see upon what principle or within what words defining the trust, read together with the proviso, such a decree can be made, seeing, as we have seen, that the condition has not been, and cannot be complied with by the parties claiming, or by any of the sections. A legacy held, upon the wording of a will, to be conditional, and the condition not being performed, the legatee is not entitled to the legacy; *Pink et al v. DeTinsy*, 2 Mad., 157. If such a decree as asked for were made it would enure, not to the benefit of any poor children, but to the benefit of the wealthy, who pay most towards the support of schools, and whose taxation would be lessened by the appropriation. They cannot, as I think, claim it under the doctrine of *cy pres*,

and it is not now necessary to say how far that doctrine could aid the defendants in their contention. That can be decided when, if at all, the trustees apply on the Equity side of this Court to authorize a mode of disposing of the trust fund, as was suggested might be done, by the learned Judge in Equity, in the decision appealed from. It is enough now to say that the plaintiffs are not entitled to the decree and distribution for which they brought their suit, and I think that the appeal must be allowed.

SMITH, J., concurred.

WEATHERBE, J.—I have listened carefully to the argument, but I have seen no reason to change my opinion.

JAMES, J.—I am quite of the opinion that the judgment of my learned predecessor should be sustained. The trust is as follows, and I do not think there is much difficulty in the construction of it:—

To have and to hold the said parcel, lot or tract of four hundred acres of land, and all and singular other premises hereby granted, unto the said William Twining, Rector of the said Church of Saint John, and John Burbidge and Benjamin Belcher, Wardens thereof, during their continuance in the said offices respectively, and to the Rector and Wardens of said Church of Saint John for the time being, in special trust to and for the use of one or more school and schools, as may be deemed necessary by the said trustees, for the conveniency and benefit of all the inhabitants of the said Township of Cornwallis, and in trust that all schools in said township furnished or supplied with masters qualified agreeable to the laws of this Province, and contracted with for a term not less than one whole year, shall be entitled to an equal share or proportion of the rents and profits arising from said school lands, provided the masters or teachers thereof shall receive and instruct, free of expense, such poor children as may be sent them by the said trustees.

The principal object of the trust is not merely or mainly to provide education for the poor, but to promote education in the Township of Cornwallis. The only apparent ambiguity

arises from the insertion in the trust of the words, "as may be deemed necessary by the said trustees." It is impossible, at this time of day, for us to know the circumstances attending this trust at its inception, which rendered these words necessary. The lands were uncultivated. The profits probably very small. There may have been one school in the township, perhaps not one. Undoubtedly, the whole funds were given in aid of the first school established there, and it was probably necessary, as other schools were established, to withdraw part of the funds to aid in establishing another school, when the trustees considered another school necessary. In all probability the words were inserted to meet some circumstances attending, or likely to attend, the original establishment of schools in the district of which we know nothing, and which have long ceased to exist. It seems to be contended that the insertion of these words gives power to the trustees to appropriate this fund in any way they please; but we must read the whole trust together, and, if there are any words in it that we cannot clearly comprehend, we must not permit the difficulty of comprehending their meaning to induce us to discard the clear, plain, requirements of the trust. No difficulty was found in the execution of this trust from 1790 to 1873. Up to that time the funds were divided annually by the trustees equally among all the schools in the township, the masters of which complied with the terms of the trust. There could not, in 1873, have been any difficulty about poor scholars, for their education is provided for by the public school law. I quite concur with the late Judge in Equity that, to use his own words, "the benefit was intended for all of the inhabitants, and, from the passing of the grant of 1796 to 1872, those who voted under it as trustees exercised no discretion in the matter, but simply carried out the trust in its terms, and, in my opinion, they pursued the only legal course open to them." This seems so plain to me that I do not wonder that these trustees, for 83 years, acting on their own judgment, construed the law, exactly as does my learned predecessor, after solemn argument as to its meaning. But if there are, which I do not see, difficulties in ascertaining what the trust does mean, I think it is very transparent,

when we scan the recent proceedings of the trustees, to compare them with the terms of the trust, that they are wholly at variance with the trust. All that the discretionary words can possibly mean is that they are to have a voice in determining how many schools were to participate. But, many or few, the rents and profits were to be expended annually. They had no right to hoard the fund; they had no right to employ it in building school houses; still less had they a right to employ the proceeds of the whole property for years, in erecting a school house for the benefit of one particular section, when the trust requires them to be expended annually for the benefit of all the inhabitants of the Township of Cornwallis. Then again, they have not only misappropriated the funds since 1873 down to 1879, but they have entered into a contract to continue to misapply them. If the discretion of the trustees had not been taken away by a change of circumstances, then the trustees have further violated the trust by so acting as to take away their own discretion over the funds. Some confusion exists in the evidence, if we do not keep in mind who the trustees are in this case. They are not the sectional trustees elected under the act, but the trustees under the grant; that is, the Rector and Churchwardens of St. John's Parish. In that capacity, they own the land on which the school house is built. Mr. Axford says: "The trustees of the school lands propose to lease this land from the Rector and Churchwardens who are prepared to give them a lease," that is, they are, as church officers, prepared to give a lease to themselves in another name. "The parish meeting has not agreed to the leasing of this land." The plain fact is, that the defendants have laid hands on this fund to erect a school house costing some \$1,500 on their own land, out of funds belonging to the whole Township of Cornwallis. The school is also to be maintained in future mainly out of the proceeds of the funds, worth some \$350 per annum, and virtually as a parish school, the rector and churchwardens to employ the teacher and control the school. It is indeed stipulated that it shall be "undenominational," but "after teaching hours, if any parents wish their children to have religious training in Church of England teaching, they can

remain and have the same; others can leave." And this Church of England training is paid for out of the trust fund. Then again it is "to be open to all children in Cornwallis Township on payment of a small fee to the trustees of school lands," *alias* the rector and churchwardens; which is not only unjust but illegal, if this school is to be supported out of public funds under the school act, and equally at variance with the terms of the trust. Yet this is to be a "public school under the law." The school section is to raise \$200 towards the teachers salary and a further sum for ordinary expenses, thereby escaping further taxation, and to give the use of the present school furniture, which belongs to the public school. Then the county fund due to the public school for the section, was to go into the joint stock, and, although not mentioned, I presume the provincial allowance would follow. The following is the record of the contract:—

A portion of copy of Minutes of School Trustees of Section No. 61, put in by consent of counsel, and referred to in evidence of F. J. Axford.

SPECIAL COMMITTEE REPORT.

The trustees, as a committee to meet with the Trustees of School Lands, beg leave to report :

1. The Trustees of School Lands will employ a first-class male teacher for the year, furnish school room and apparatus.

2. If the section will raise \$200 towards the teacher's salary, and a further sum to meet all expenses incurred in heating and cleaning school room, and give the use of the present furniture, maps, apparatus, etc., free, school to be undenominational and wholly under control of Trustees of School Lands. And further, your committee would recommend the section to comply with the trustees, proposal, as the Trustees of School Lands propose erecting a school house in Section 61 early next summer.

Signed by the committee.

T. H. O'BLENUS,
HENRY S. NEWCOMBE,
HOWARD D. WEST.

An interesting conversation ensued upon the report explaining the conditions more fully, thus : The county fund shall be the property of the School Land Trustees ; and further, the school to be open to all children in Cornwallis Township on the payment of a small fee to the Trustees of School Lands. And further, the school shall be conducted in accordance with the law ; and, after teaching hours, if any parents wish their children to have religious training in Church of England teaching, they can remain and have the same ; others can leave. And the Sectional Trustees shall aid and assist the School Lands Trustees when required.

Moved by J. P. Lyons, seconded by T. H. O'Brien, "That we adopt the committee's report."

A vote being taken the Chairman declared the vote to stand 14 for the adoption and 5 against.

(Sgd.) W. TWING.

I make no further observation on these proceedings than that they are, in my view, a plain, clear violation of the terms of the trust, and cannot be covered or protected by the discretionary clause in the grant, whatever that may mean. This is what this Court is asked to enjoin. It is objected that this cannot be done, because :

1. There is no evidence that there are any teachers in the Township of Cornwallis employed for a whole year ; but this was neither stated in the answer nor specified in the grounds of appeal, and is, therefore, out of Court. If it were not, and had application been made to the Judge in Equity, he would have had the evidence furnished in the shape of an affidavit from the Superintendent of Education, which could be got in an hour.

2. Then the bill asks for an account, and that cannot be granted, because the plaintiffs are not entitled to ask for it. But the funds are for the benefit of the inhabitants of the Township of Cornwallis, and the plaintiffs are the inhabitants of the township issuing "on behalf of themselves and the rest of the inhabitants and rate-payers of the Township of Cornwallis." Surely they are the parties injured ; therefore, the parties, and, in my opinion, the only proper parties, to

complain. Besides, a bill for an injunction alone may be and has frequently been sustained.

I think the bill should be sustained and its prayer granted for an accounting with an injunction.

At the same time, noticing the intimation of my predecessor, at the close of his judgment, that this court has very large discretionary power in cases like the present, when regularly appealed to, I would be very glad if some arrangement could be made which would permit these funds to be employed in some other manner not inconsistent with the trust. A decision was given by my predecessor Judge Johnston some years ago which I regret has not been reported. Mr. Jackson, a citizen of Halifax, bequeathed a fund for the education of poor boys in Halifax before the enactment of the free school system. The adoption of that system providing free education for all rendered the bequest unnecessary. The trustees applied to the court for advice and the learned Judge in Equity, exercising his discretion, added the bequest to the funds of Dalhousie College. I think it highly probable that had my learned predecessor been applied to by these trustees for direction, the funds might have been applied to the institution of an Agricultural School, or in some other way far more advantageous to the township of Cornwallis, in an educational point of view, than the distribution of the profits annually among the teachers of the township ; more especially as those hired by the year are usually a minority in number, and generally employed in the more wealthy districts, which could best afford to do without the subvention. I will be glad if this suggestion should lead to an amicable arrangement of this unfortunate affair.

I think the appeal should be dismissed with costs.

MCLEAN v. BELL ET AL.

Before McDONALD, C. J., and SMITH, RIGBY, and THOMPSON, J. J.

(Decided March 31st, 1884.)

Bill of Sale.—Possession of grantee.—Construction of Revised Statutes, (4th Series,) Chapter 84.

CHAPTER 84 of the Revised Statutes, (4th Series,) "Of the Prevention of Frauds on Creditors by Secret Bills of Sale," section 1, enacted that "every bill of sale * * * whereby the assignee shall have power * * * to take possession of any property * * * shall be filed with the Registrar of Deeds of the County * * * otherwise such bill of sale, as against * * * sheriffs * * * seizing the property under process of law, shall only have priority and take effect from the time of the filing thereof."

Held, not to apply to a case where the grantee under a bill of sale not filed had gone into actual possession of the property prior to the seizure by the sheriff.

This was an action of trover brought against the Sheriff of the County of Halifax. After pleas pleaded and issue joined, the defendant died, upon which the plaintiff entered a suggestion of his death and continued the action against his executors. The facts were as follows:—

George McLean gave a bill of sale of certain chattels to Ann McLean, the plaintiff, to whom he was indebted in the sum of \$1500. The bill of sale was given on a Saturday afternoon at an hour when it could not be recorded, but a person was put in possession of the property covered by it. At any early hour on Monday morning the Sheriff attached the property under the Absconding Debtors Act. The bill of sale was registered subsequently. The property having been sold by the Sheriff under his levy, the plaintiff brought an action of trover against him.

The cause was tried before RIGBY, J., at Halifax, and a verdict found for defendant. Plaintiff obtained a rule to set the verdict aside and for a new trial.

Sedgewick, Q. C., in support of rule.—Our statute does not apply to cases where possession is actually taken. The bill of sale may be void, but there is nothing to avoid the title by possession. Our act says the bill of sale shall only have priority from the time of the filing thereof. If, as a matter of fact, possession under the bill of sale was taken by Ann McLean, and she was in possession at the time of the levy, the

question of apparent possession cannot arise at all. (RIGBY, J.—Suppose I hold a bill of sale on a horse, which matures in a month, and default is made, can possession be taken ten years afterwards under an attachment? *Eaton*.—That is not this case. RIGBY, J.—Mr. Sedgewick says it is. If the bill of sale gives the right to take possession, it seems to me possession was rightly taken before the attachment.) There is another point. Mr Parsons proved no debt. The statute is for the protection of creditors. (THOMPSON, J.—The statute says the bill of sale shall be void as against the Sheriff seizing under process. That is, whether the process is good or bad.) The Sheriff can only seize for a creditor. The act is for the prevention of frauds on creditors, and where the bill of sale is declared void as against the Sheriff, the Legislature must have intended the Sheriff seizing on behalf of a creditor.

Eaton, contra.—The amount secured by the bill of sale was not payable until Monday. The plaintiff could not enter until day time. Possession does not appear to have been taken in any sense. John McLean simply went to the house. (McDONALD, C. J.—George McLean could give possession voluntarily before the time for taking possession.) He could do it, but there is no evidence that he did. There was no change of possession. Mrs. McLean still remained in possession, and was there in possession when we levied on Monday. There was no sale independently of the bill of sale. The goods were not given in extinguishment of the debt. (THOMPSON, J.—The goods were the absolute property of the plaintiff at law. The grantor would only have an equitable right. RIGBY, J.—Have you any cases to show what would be a taking possession, or that the possession taken by John McLean would not be enough?) No. But John McLean did nothing. I think the whole question is whether the bill of sale took effect. (RIGBY, J.—I think the question is, first, whether the time had come to take possession; and second, whether possession was taken. The bill of sale had matured, and possession was taken when you went there. It had ripened into a complete title. What can you say?) The bill of sale had not been filed when the levy was made. (RIGBY, J.—Then you could levy five years after possession had passed.) I see no reason

why we could not. (*Sedgewick, Q. C.*—Then a manual transfer is good, but if you put it in writing it is bad.) No possession was taken. (McDONALD, C. J.—John McLean went to the house on Saturday and showed his authority to take possession, which was recognized. He returned to the house on Sunday and slept there. The following morning, when the Sheriff came and asked to be allowed in, John McLean informed him he was in possession, and showed his authority. If that was not taking possession I don't know what would be.) Cites *L. R.*, 5 Chancery Division, 809. (McDONALD, C. J.—That is against you.) No default was proved until after all the evidence was in, when the Judge allowed evidence to be called. (RIGBY, J.—That was in his discretion.)

THOMPSON, J., (March 31st, 1884,) delivered judgment as follows:—

The defendants are representatives of the late Sheriff of Halifax, who was (in his lifetime) sued in trespass and trover for taking household furniture under a writ of attachment in the suit of *J. Parsons v. George McLean*. The furniture had been that of George McLean who, being indebted to the plaintiff, agreed with her agent to give her the furniture to sell with a view to her debt being paid out of the proceeds. On the 18th of November, 1882, he gave her a bill of sale by way of mortgage for \$1500, to be paid in one day from date, and the instrument was dated the 17th, in order that the debt might be, under the bill of sale, as it had been previously, a debt due and payable at once. The plaintiff then put an agent in possession and George McLean left the premises, although some of his family remained in the house where the furniture was. The transaction having been completed on Saturday afternoon, after office hours, the bill of sale was not filed on that day, and on Monday, before office hours, the Sheriff went with the attachment and seized the furniture from the possession of the plaintiff's agent. The *bona fides* of the transaction between George McLean and the plaintiff are not disputed, but the creditor claims priority for his attachment over the bill of sale, by virtue of the 1st section.

of the Bills of Sale Act, chapter 84, R. S., (4th Series,) which enacts that "every bill of sale * * * whereby the assignee shall have power * * * to take possession of any property * * * shall be filed with the Registrar of Deeds of the County * * * otherwise such bill of sale, as against * * * Sheriffs * * * seizing the property * * * under process of law, shall only have priority and take effect from the time of filing thereof." Defendant's counsel also contended that the goods were really in the possession of the mortgagor when the Sheriff made the seizure, but the evidence is clear enough to refute that contention. The day and night before the levy the agent was in the house where the furniture was, and when the Sheriff came he refused to allow that officer to enter, and showed him his written authority to take and keep possession of the property under the bill of sale. The Sheriff only made the levy by persisting against this remonstrance. The mere fact of some of the debtor's family being on the premises would not defeat the possession of the assignee. See *Davies v. Jones*, 7 L. T., N. S., 130, and *Graham v. Wilcokson*, 46 L. J., Ex., 55. The main question then is as to the Bills of Sale Act, and I am of opinion that that act does not apply to a case like this, which is consummated and completed by a change of the actual possession. The English and Canadian Acts explicitly exclude such cases, and I think the true construction of ours excludes them also. The policy which the act was intended to promote was "the prevention of frauds on creditors by secret bills of sale." A *bona fide* transfer of personal property by which the goods openly passes from one to another, did not partake of the secrecy, or other mischief, which the statute was designed to remedy. Such a transaction would be quite valid without any such assurance as a bill of sale, and it cannot be held invalid merely because such an assurance was taken for precaution and certainty. To apply the statute to such cases would be to bend everything to its literal reading, which is not by any means so reliable a guide to the intention as a consideration of the mischief designed to be remedied, and of the nature of the remedy designed. As was said by the present Master of the Rolls in *Brainton v. Griffiths*, 1 C. P. D., 356: "An act

which, however salutary, may have the effect of taking away rights of property honestly acquired, must be construed strictly." *Davis v. Goodman* 5 C. P. D., 128, shows an application of that principle. A different construction would enable the grantor, after conveying his property and giving it into the possession of the grantee, to defeat the conveyance by confessing judgment, or otherwise procuring execution to be issued before the instrument could be filed. The omission, on the part of the Legislature, in copying the statute, to enact the words of the English statute, confining the operation of the enactment to cases in which the grantor remained in possession, real or apparent, would perhaps be a weak argument for construction under any circumstances; see *Maxwell on Stat.*, 2nd ed., pp. 391, 392; but it is worthless as applied to this statute, which has been so carelessly copied that it contains one clause without any meaning, defining an expression which does not appear in any part of the statute. There are parts of the statute, however, which indicate that in adopting this construction we are not restricting the enactment, but carrying out the intention of the Legislature fully. The words "every bill of sale of personal chattels * * * whereby the assignee shall have power * * * to take possession," show that the Legislature had in view the case of a grantee having a power over the property, which he was not exercising, but holding unexercised, to the disadvantage or other creditors; and in section 6 the term "personal chattels" is defined as meaning goods, furniture, fixtures, and other articles capable of complete transfer and delivery, implying a still further limitation in favor of grantees, who could not take possession by reason of the special character of the property. If a grantee cannot take possession, for such reason he is safe without filing, but why should he be protected unless possession is intended to be the test of the statute's applicability? And why should the grantee, who can and does take possession, be in any worse position?

The rule *nisi* for a new trial should, in my opinion, be made absolute.

RUSSELL v. COOK.

Before McDONALD, C. J., and SMITH, WEATHERBE, RIGBY and THOMPSON, J.J.

(Decided March 31st, 1884.)

Award silent as to set-off.—Sufficient if made de præmissis.

AN award professed to be made of and concerning all the matters referred in the cause or under the order, and the arbitrator awarded that the plaintiff had no good cause of action herein against the defendant. and that there was nothing due from the defendant to the plaintiff herein.

Held, that it was no objection to the award that no specific reference was made to a set-off claimed in the cause by the defendant.

This cause came before the court on a rule to set aside an award that the plaintiff had no good cause of action against the defendant, and that there was nothing due from the defendant to the plaintiff. The ground mainly relied on in support of the rule was that the award was not final, inasmuch as it failed to decide on all the matters referred for determination.

Drysdale, in support of rule—The whole point is that the defendant's set-off is not dealt with. The last three lines of the award award that "there is nothing due from the defendant to the plaintiff." That does not dispose of the defendant's set-off. The plaintiff is still liable to be sued for the off-set. The affidavit of plaintiff's attorney sets out that the arbitrator refused to permit the examination of the defendant in reference to certain letters and drafts. That amounts to misconduct. (*Weeks, Q. C.*—The plaintiff is contradicted about the rejection of the evidence by the arbitrator and others. The arbitrator swears that Mr. McGillivray withdrew the evidence.)

As to the finality of the award cites *Russell on Awards*, 681; 2 *Dowl., N. S.*, 122; 1 *B. & Ad.*, 723; 7 *East.*, 80. The affidavits show conclusively that the off-set was not considered. (McDONALD, C. J.—I do not think you can go outside of the award.) I think the award is sufficient for our purpose. If the award had been general on all matters referred it would have been good; 2 *A & E.*, 751. The award is limited to the words in the last three lines.

Week, Q. C., and *Weston*, contra.—The question is whether a verdict would be good if rendered in the words used by the arbitrator. To determine this it is necessary to

consider the award in the light of the case referred. On the one hand is a claim consisting of a list of items extending over a period of years, and, on the other side, an off-set of larger amount, but a large part of which appears to be barred by the statute. The rule of reference contains a provision that judgment may be entered on the award on the matters referred as if a verdict of a jury had passed. An arbitrator may give evidence as to proceedings before him; *4 Esp.*, 180; *4 D. & E.*, 146. It is no ground for impeaching an award that an arbitrator has made a mistake of law as to admissibility of evidence; *4 Dowl. Prac. Cases*, 493; *3 U. C., Q. B.*, 184; *4 Price*, 235. No error appears on the face of the award; *Russell on Awards*, 288; *5 M. & S.*, 504; *10 C. B., N. S.*, 661; *3 R. & C.*, 501; *14 M. & W.*, 9. Where there is a suit after an award the arbitrator may be called to show what matters were considered by him; *4 Esp.*, 180. (RIGBY, J.—That refers to a case where the award is general enough to cover the matter alleged to have been considered.) The award here is general enough if it is read in the light of the case submitted. Where all matters in difference are referred, an action cannot be subsequently brought; *4 M. & Ry.*, 571. Where the award professes to be “of and concerning the premises” if the terms of the awarding part are large enough it is *prima facie* a decision of all matters submitted; *Russell on Awards*, 255; *3 M. & P.*, 553; *5 B. & Ald.*, 848. In *13 C. B.*, 398, 415; the silence of the arbitrator as to a cross claim was held to negative it; *9 B. & C.*, 780.

Meagher, Q. C., contra.—The cases last cited decide nothing more than that where an arbitrator makes an award in favor of a party, he is precluded from suing afterward. The main point is whether the award is final, not having settled the claim of set-off. *Kilburn v. Kilburn*, *13 M. & W.*, 670, is directly in point on this question. An earlier case is reported in *9 Dowl.*, 1052. In the cases cited on the other side there was no set-off.

WEATHERBE, J., (March 31st, 1884,) delivered judgment as follows:—

Harrison v. Creswick, *13 C. B.*, 414, was relied on at the argument. That case was decided in the Exchequer

Chamber. The reference was of the cause and all matters in difference between the parties as here.

The arbitrator professed to make his award of and concerning the several premises so referred as aforesaid. After disposing of all the issues in favor of plaintiff he directed the defendant to pay a gross sum to the plaintiff, apportioned the costs of the reference and award, and, on payment, directed that plaintiff should execute and deliver to defendant a general release, but nothing was said as to the cross claim.

It was held nevertheless that the award was final for that it must be intended, from the silence of the arbitrator upon the subject, that he had negatived the cross claim.

It was decided by PARKE, B., on the authority of the note to *Birks v. Trippett*, 1 Wm. Saund., 33, "that, even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator does not, *per se*, prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several matters submitted to him, provided that it does not appear that he has excluded any." This was in 1853.

Notwithstanding this decision the same question was raised in 1857 in the Common Pleas in *Jewell v. Christie*, L. R., 2 C. P., 300. The award in that case professed to be made "of and concerning all the matters referred to the arbitrator in the cause and under the order," and BOVILL, C. J., said: "The presumption, therefore, is that the arbitrator intended by what he has done, and has in fact disposed of all the matters which came before him." The learned Chief Justice based his decision especially upon the case of *Harrison v. Creswick*, referred to above.

MONTAGUE SMITH, J., in commenting upon the rule referred to by PARKE, B., 1 Wms. Saund., 33, remarked.—"That rule was acted upon by the court of error in *Harrison v. Creswick*, and probably that case was taken to the Exchequer Chamber in consequence of doubt which was entertained as to the doctrine in *Birks v. Trippett*. The court, however, affirmed it. In the

present case the award professes to be made of and concerning all the matters referred in the cause or under the order. That, to my mind, is equivalent to a declaration that there were no matters in difference either in the cause or under the order other than those specifically disposed of.

The same question had been before the Court of Exchequer in the previous year; *L. R. 1 Ex.*, 251, where objection was taken to an award that the arbitrator had not found each matter referred to him separately, and it was held that was no objection to the validity of an award unless from the submission it is clear that the intention of the parties was that he should so find.

RIGBY, J.—One of the grounds on which plaintiff claimed that his rule should be made absolute was, that the award “that the said plaintiff had no good cause of action herein against the defendant in this cause, and there is nothing due from the said defendant to the plaintiff herein,” although it was expressly made “of and concerning the premises” did not dispose of the off-set which defendant had pleaded and which was included in the submission of the cause and “all matters in difference therein.” The courts are now more in favor of upholding awards than the earlier decisions would indicate. PARKE, B.—In the case of *Harrison v. Creswick*, 13 C. B., 414, said “Where an award is made *de praemissis* the presumption is that the arbitrator intended to dispose finally of all the matters in difference, and his award will be held final if by any intendment it can be made so. The rule is this that where there is a further claim by plaintiff or cross demand by defendant and the award, professing to be made of and concerning the premises, is silent respecting such further claim or cross demand, the award amounts to an adjudication that the plaintiff had no such further claim, or that defendant’s cross demand is untenable. The case of *Duckworth v. Harrison*, 4 M. & W., 432, was an action of debt in which defendant had pleaded the general issue and a set-off, and the cause having been referred the arbitrator awarded that the plaintiff was not entitled to recover in the action, and had not any cause of action against defendant, but

said nothing as to the set-off, yet the award was held to be final.

A reference was agreed to between the Duke of Beaufort and the Swansea Harbour trustees to determine :—

1. The consideration to be paid by the trustees for the purchase of the fee simple of certain lands of the Duke, and

2. What other, if any, sum or sums should be paid as compensation for severing the lands in question from the other lands of the Duke.

Evidence was heard by the arbitrator in reference to the injury to such other lands in consequence of the severance, and he awarded "That the sum of £5627 is the consideration money or value, and shall be paid by the trustees for the purchase by them of the fee simple of the lands," and such award was held good on the ground that the silence of the arbitrator on the subject sufficiently negatived the claim for severance damage ; *8 C. B., N. S.*, 147. The authority of these cases remains unimpeached. They disclose the principles which govern questions of the kind before us, and are so much in point that they completely dispose of this ground of attack upon the award. The only other point upon which it was sought to impeach the award was, that the arbitrator had been guilty of misconduct in refusing to admit evidence tendered on behalf of the plaintiff. Even if the affidavit on this point had not been met by the affidavits in reply, we are of opinion that the facts as presented in Mr. McGillivray's affidavit did not amount to misconduct of the arbitrator, such as would invalidate the award, but were nothing more than the exercise by him of a discretion within his authority and over which we would have no power of review.

The rule to set aside the award will be discharged with costs.

MCDONALD, C. J., concurred.

JOHNS ET AL. v. BARBOUR ET AL.

Before McDONALD, SMITH, JAMES, WEATHERBE and THOMPSON, JJ.

*(Decided March 31st, 1884.)**Appeal from refusal to restrain a sale dismissed when advertized day of sale was past.—Res adjudicata.*

PLAINTIFFS had obtained a restraining order from the former Judge in Equity under a judgment which was reversed *in banco*, after which plaintiffs obtained from the present Judge in Equity, leave to amend their bill, and applied for a second injunction, which was refused on the ground that the case had not been varied by the amendment, and the Judge in Equity was bound by the judgment of the Court *in banco*. The appeal from this refusal was dismissed.

Per McDONALD, J., and THOMPSON, J., that there was no question to decide, as the injunction was to restrain a sale advertized for a day which had long since passed.

Per WEATHERBE, J., that the matter was *res adjudicata*.

JAMES, J., adhered to his judgment as Judge in Equity.

This was an appeal from a decision of JAMES, J., refusing to grant a restraining order to prevent the sale of land under a judgment obtained by defendants, on the ground that, on appeal from a judgment of his predecessor, (RITCHIE, E. J.,) granting the order applied for, on a previous application, all the Judges concurred in reversing the decision. The learned Judge said that he could not see that the position of the case was at all altered since the previous decision was given, except by his having granted the plaintiffs leave to amend their bill, which could not affect this question.

The judgment of RITCHIE, E. J., from which the previous appeal was taken, with the argument and the judgment of the Court, by which JAMES, J., considered himself bound are reported in 3 R. & G., 43.

The present appeal was argued January 15th, 1884, by *Bingay, Q. C.*, in support of appeal, and *Pelton, Q. C.*, and *Meagher, Q. C.*, contra.

JAMES, J., (March 31st, 1884,) delivered judgment as follows:—

As the general circumstances of this case sufficiently appear in previous decisions, I need refer to them very briefly. RITCHIE, E. J., granted an injunction to restrain

a judgment creditor from selling land of an insolvent party under execution, at the instance of an assignee claiming to hold the land under a prior title, on the ground that the sale would throw a cloud on plaintiffs' title. This decision was appealed from to this Court, my predecessor, who gave the judgment, being a member of the Court at the hearing of the appeal, and the Court, with his concurrence, reversed his judgment. After I had taken the position of my predecessor as Judge in Equity, an application was made to me, on behalf of the plaintiffs, to amend their bill, which was allowed, and the bill was amended, charging that the defendant, the judgment creditor, was proceeding "maliciously" to injure the plaintiffs' title by again advertizing the property for sale. An application was then made for a second injunction. Had the affidavits shown actual malice, it would have been for me to decide whether that circumstance amounted to such a change of the position as would have justified me in granting an injunction, notwithstanding the decision of the Court of Appeal. But the affidavits did not at all sustain the amendment, and as there had been, in reality, no change of position, I felt myself bound by the decision of the Court, being the Court of Appeal, and therefore the superior court. I think it was admitted on the argument; at least I believe it is not doubted, that my judgment was correct; and if correct, in my opinion, it ought to be sustained. The argument was not that I had given an unsound judgment, but that this Court of Appeal, in giving the decision by which I was undoubtedly bound, had given an unsound judgment, which ought to be reversed. I give no opinion, at present, as to the propriety of that decision, because I do not think that it comes before us in such a way as to permit us to do so. The amendment granted by me turns out to have been merely colorable, for the purpose of bringing up the question again, and getting, by means of a pretended appeal from my judgment, a decision reversing another and different judgment. If the Court should sustain this appeal it will encourage suitors in other cases to resort to ingenious subterfuges to evade the regular practice of the Courts. Against such proceedings, I think the Courts should be always

on their guard, and should uniformly refuse to encourage them by permitting them to be in any case successful. It seems to me that there is but one answer to this reasoning, viz., that I ought not to have held myself bound by the deliberate decision of this superior court in the same cause unappealed from, and therefore, my judgment was erroneous; but I do not think that this position would be advocated by anybody. It certainly was not contended for on the argument of the appeal. I admit the general principle that the Court has jurisdiction to correct its own errors, and, where the error appears on the face of a decree, provision is made by the practice of the Court for reconsideration under a bill of review, which is seldom, however, resorted to. The former decision of this Court was not the subject of a decree, but of an order to discharge a former order of the Judge in Equity. Whether the plaintiff had any other method by which he might, by order *nisi* to rescind, granted by the Judge in Equity, as is permitted at common law, or otherwise, have obtained a reconsideration of the question decided against him by this Court, it is not necessary for me to consider. If there is no other remedy in such a case as this, I am prepared to concur in a rule of Court to provide, in future cases, for a remedy, by motion to rescind, to be made before this Court of Appeal, or otherwise, and if the former decision of this Court could regularly be reversed by us now, I am not at all prepared to say that I would not concur in its reversal; on that point I give no opinion. The question is of very considerable importance, and will doubtless soon arise again; and, if applied to for an injunction under similar circumstances, I would feel much embarrassed by the existence of the former judgment, unimpeached by a counter decision, if, in my judgment, the injunction ought to be granted. Since the appeal was taken in this case the sale under execution has taken place, and, therefore, the only significance of our present judgment will be as a legal precedent. I do not, of course, intend to impugn the right of the Court to overrule this or any other of its decisions when cited as a legal precedent, but only decide that in this cause not being under appeal, it is final. In my opinion the appeal should be dismissed with costs.

WEATHERBE, J.—I am of the opinion that the question is *res adjudicata*, and that the appeal should be dismissed with costs.

THOMPSON, J.—The reasoning set forth in the former judgment of the Court does not relieve my mind from doubt as to whether a right conclusion was then arrived at, and I should have much difficulty in adopting the reasons or conclusion announced in the present judgment. Having said this much to guard myself from appearing to assent, I refrain from delivering the judgment on this appeal which I would have delivered if an opportunity had presented itself for me to do so in due time. At present, I feel that I am called on to express no opinion in favor or either party. The only object of the proceedings was to prevent a threatened sale which was advertized for a day which has long since passed. The Court having given no restraining order before that day, permitted the sale to take place, as it now appears that a majority of the Court would have done if the judgment had been given before that day. There being then no question, either of right or of remedy, remaining for our judgment, I feel that I am not called upon for any decision.

MCDONALD, J.—I agree with Mr. Justice THOMPSON. I do not feel bound to express an opinion.

IN RE STEEL COMPANY OF CANADA (LIMITED.)

Before MCDONALD, C. J., and SMITH, WEATHERBE, RIGBY and THOMPSON, JJ.

(Decided March 31st, 1884.)

Winding-up order set aside on technical grounds.—New order granted upon same petition held good.

As order was made for the winding up of the company, and, under that order, a provisional liquidator was appointed. The order was set aside as notice had not been given as required by the statute. Notice was thereupon given and a new order taken without any further petition.

Held, that no new petition was necessary.

Meagher, Q. C., now, (February 21st, 1884,) moved to make absolute his rule *nisi* to wind up the company and to appoint liquidators. (See *ante* pp. 17, 49.)

Ritchie, Q. C., contra.—The petition is the basis of the whole thing. The petition produced in Court is not referred to in the order, is not headed in the same matter, and is not addressed to the Court. The petition formerly presented was addressed to the Chief Justice or any one of the Judges, but that petition is gone. It was presented to Judge RIGBY, who made an order, which was set aside. The petitioners cannot avail themselves of that now. (McDONALD, C. J.—The presentation was made to Judge RIGBY, as the Court.) There are no grounds in the petition for a winding-up order. The first ground for winding-up is inability to pay debts as where the company has neglected to pay within sixty days after notice in writing. No notice is shown. The only clause on which there can be any pretence for petitioning is that providing for winding-up, if the company has in any other way acknowledged its insolvency. The only evidence of this is the admission of a counsel in court, which is not sufficient. There should be something like a formal vote of the board of directors. We have an affidavit from Mr. Kenny to show that the company is solvent.

Henry, Q. C.—We do not attach much importance to the affidavit. We merely introduce it as an argument that the Court should not lightly pass upon the question of insolvency. It shows that the very man who makes the statement in admission of insolvency makes another statement that the company, if wound up independent of insolvency, could pay its obligations in full. The petition is in the nature of a bill in equity, which must show valid grounds, and must be heard, and which may be demurred to. The notice is insufficient inasmuch as it gives no notice of a hearing of the petition. The order is taken "on reading exhibits and papers on file herein." The petition is not directly or indirectly brought before the Court and cannot be read or used for the purpose of obtaining the order asked for. The order can only be obtained on a hearing, which is inconsistent with an application of this kind. The merits of the petition should be gone into and the parties examined. Section fourteen of the act provides for the adjournment of the hearing. No notice of a hearing is given. If the petition was presented to Judge RIGBY the Court would

have no jurisdiction to make the order, unless on an adjournment of the hearing of the petition, or a fresh application, of which there must be notice. There is no proof of notice to the company of presentation of the petition on either the 29th January or the 17th February. If the petition was presented on the 29th January, as is admitted, it was disposed of, and this Court could have no jurisdiction except by an adjournment of the hearing. The term "hearing" is inapplicable to such an application as this; *Bouv. Law Dic.*; *L. R.*, 10 Chan., 188. The proceedings are analogous to those in bankruptcy; *Robinson on Bankruptcy*, pp. 183, 184, 186. A second application cannot be made unless by leave of the Court; *L. R.*, 17 Eq., 454; *L. R.*, 8 Eq., 664. The presentation must be made at a definite time, as the time affects the rights of parties. The petition was undoubtedly presented to Judge RIGBY, and his order having been discharged, the Court should have been applied to for a rehearing. The winding-up order cannot be made until after an adjudication of bankruptcy, which has not been made. The only words in the petition that can justify it are the words that the company "has otherwise acknowledged its insolvency." The statement that the company is unable to pay its liabilities as they come due, is no good of itself, as the inability must continue for 60 days; *L. R.*, 9 Eq., 122. The party opposing the application must have an opportunity of seeing what the acknowledgment is; *L. R.*, 8 Eq., 146.

Meagher, Q. C., in reply.—The Merchants' Bank of Halifax are the only creditors who oppose the application, and they do so on the ground that their rights will be interfered with. If they have any rights under a contract with the company, there is machinery in the Court to protect them. Under our act the only persons who can oppose the application are the company. Section 17 applies only where the company oppose the application. The petition is headed "in the Supreme Court," and shows what is prayed for. It is specific as to what is alleged, and what is asked for. It alleges that the company had failed to meet one note, and said they would be unable to meet others, and otherwise acknowledged their insolvency; *Foster v. Roome*, 3 R. & C., 344. In that case

the affidavit stated that the insolvent had called a meeting of creditors without showing the time, and otherwise acknowledged his insolvency, and the Court, on appeal, reversing the decision of the County Court Judge, held it sufficient. Nobody but the company can object to the proceedings, as no one but the company is notified, and the company can only do so on the grounds in section 15. They cannot object to the form of the petition. In the case in *L. R.*, Ch. App., 188, it was the company that appealed, and from practice the form of the petition appeared to be well settled. In England the Court in which the proceedings are to be taken is the Chancery Court. Here it is the Supreme Court of Nova Scotia. Section 4. (WEATHERBE, J.—We have equity jurisdiction.) *Taylor on Evidence*, section 772, *et seq.* On the presentation of the petition it is for the company to show that it is not insolvent. Section 14 is directory only. The Court need not do any of the things mentioned. The powers of the liquidator are defined by section 35. He is not in the position of an assignee in insolvency. It is important that the creditors should have a voice in his appointment, and for this reason they are notified. Section 24 says the liquidator is not to be appointed until the creditors are heard, but not that the company cannot be wound up. The fact that a creditor has an attachment is no reason why he should be heard in opposition to the winding-up. It is rather a reason why he should not be heard. He is protected as to costs. The rule taken by the other side did not attack the petition, and it still is outstanding. If anything, the judgment of the Court sustained the petition.

SMITH, J., (March 31st, 1884,) delivered judgment as follows :—

This is an application on petition by a firm doing business in London, G. B., under the style of Messrs. Gillespie, Moffat & Co., creditors of the Steel Company of Canada, carrying on business at Londonderry, in this Province, to obtain “a winding-up order,” under the provisions of the Statute of Canada, 45 Vic., Cap. 23. The petition, in the first instance, was presented to my learned brother Mr. Justice RIGBY, at

his Chambers, on the 29th of November last, and an adjudication thereon was had by him, and the order applied for granted on the 3rd December following; but in that order there was the appointment of Mr. Duffus as the provisional liquidator. A rule *nisi* was taken out to set aside the order, on several grounds, one of which, and the most important one, was that the Statute of Canada, above referred to, could not be invoked against, and had no application to incorporated foreign companies doing business in this country. It is unnecessary for me to deal with this contention because a majority of this Court, after argument, has decided that the provisions and scope of the statute are applicable to such companies. I do not deem it necessary for me to express an opinion as to the effect of the legal principle of *res adjudicata* on this case, in view of this decision, because, having been one of the majority who thus held, I have heard nothing to vary my opinion. The Court, however, did not sustain the order granted by Mr. Justice RIGBY, because they considered that the 24th section of the act, under which a liquidator is provided to be appointed, had not been complied with by giving the notice required by such section. An application was subsequently made by Mr. Meagher to the Court *in Banco* to obtain another winding-up order, and after the necessary notices had been given, as required by the Court, the right to his obtaining such order was, on motion, argued and heard by us. We have now to decide whether the order shall pass. Mr. Ritchie, Q. C., who opposes the granting of it, represents the Merchants' Bank of Halifax, who, it is alleged is, and, I believe, is admitted to be a creditor of the company. He contends that when the order granted by the learned Judge was set aside it was necessary that there should be another presentation of a petition, of which proper notice should have been given. It is not contended that any other petition was prepared or presented than the one used before Mr. Justice RIGBY, and that was on file in this Court among the papers in the matter. In regarding the object of the Legislature in passing the act which we are considering, which undoubtedly was to provide for an equitable distribution of a company's assets when they became unable to meet their engagements, I

think we must not construe the statute in such a way as to defeat the manifest designs it was intended to effect. After a company has clearly been rendered subject to the purview and objects of this law, it never could have been intended to permit a creditor, who might, through some astute counsel, discern a mere technical and trivial defect in the application or otherwise, to wrest the whole of the estate from the custody it was provided to pass into, and to secure his entire debt to the detriment of other creditors, and thereby override the whole policy of the legislature on a subject so important to commercial interests. I therefore think that this petition was sufficiently presented to satisfy the requirements of the statute. But quite irrespective of this view I do not see anything in the act expressed, or indeed to be implied in such a manner as would leave us no alternative but to draw such a conclusion as would warrant a creditor coming in and opposing the winding up of a company's affairs upon a mere objection to the form or sufficiency of the application by another creditor. I think the notice required by section 24 of the act is solely referable to the appointment of a liquidator or liquidators, in which creditors are given a voice.

I am of opinion that the order should be granted.

WEATHERBE, J.—I wish my former judgment to be considered as read here. I desire it to be understood that the opinion I have expressed already in this matter is the same, after another argument, as I now hold in arriving at the conclusion that this Court has jurisdiction, and all that I there expressed may be considered as repeated here. I think the petition is somewhat in the nature of a bill to settle a partnership, as expressed in some of the cases which I examined when the case was before us,—that it has been so treated in the English Courts, and we should so treat it here, and, therefore, that it stands in the position of a bill filed in the Court. And I think it was not necessary to present another petition, the result of which would be to let in the attachment, a result which the English Courts have gone a great length to prevent. We are not required, I think, to go so far in holding the

petition valid, so as to prevent one creditor from grasping the property which the Legislature requires shall be participated in by all the creditors. This is the main point. As to the form of the notice, it was the notice required by the Court to call in the creditors and others mentioned in the statute, and we have no rule requiring any particular kind of notice, as is provided for by rules made in the English winding-up act. I think it was sufficient to call in the creditors, as it has called in the creditor who objects in this instance on the ground that it was not a sufficient notice.

THOMPSON, J.—In the opinion which I expressed on the application to set aside the winding-up order made by my brother RIGBY, I stated the difficulties which I felt as to the application of the statute to this company. These difficulties appear to me now as formidable as they did then, but I still think that the authorities referred to then warrant us in exercising jurisdiction. The views expressed by the majority of the Court on that application, as regards the procedure, would, if I were able now to concur in them, or felt myself bound to follow them to their logical result, lead me to think that the procedure adopted in the present instance, as regards presentation of the petition and notice, is defective; but I am not able to concur in those views, and I do not feel bound by my understanding of them after the opinions which have just been delivered. I therefore concur in the making of the order.

RIGBY, J.—The Court thought that section 24 of the act made it necessary that notice should be given to creditors, &c., before the appointment of liquidators, and as it also provided that the winding-up order must appoint a liquidator, it followed that the order made by me must be set aside, as no previous notice had been given to the creditors. This notice has since been given, and, as I adhere to the opinion which I expressed after the former argument, I am of opinion that the creditors can now only be heard in relation to the nomination of liquidators, and that it is not open to them now to take advantage of the several objections raised against the order asked for.

MCDONALD, C. J.—On the former argument I differed from the opinion that the Court had jurisdiction, on the ground that the act was not intended to apply to companies incorporated under a foreign law. So far as I am capable of doing so, I have endeavoured to reconsider the whole question, but I have not been able to change my opinion. I still entertain my former opinion, and I desire the judgment then delivered to be considered the expression of my opinion on that point, which is the only point on which I wish to give judgment to-day. There are, however, one or two cases which I desire to add ; *Cope v. Doherty*, 4 K. & J., 367 ; 2 *De. G. & J.*, 614, 623 ; *L. R.*, 12 Q. B. D., 526, 527.

LYNDS ET AL. v. HOAR ET AL.

Before McDONALD, JAMES, and SMITH, J J.

(Decided March 31st, 1884.)

Verdict of jury sustained against Judge's charge.—Contradictory evidence.—Receipt for money.

On a suit to recover a sum of money claimed by plaintiffs to be due from defendants, the latter produced a receipt for the amount which plaintiffs swore was given under the impression that a bill paid with others by one of the defendants was a £10 bill whereas it proved to have been a bill for only \$5.00. The learned Judge charged the jury that the preponderance of evidence was with the plaintiffs, but the jury having found for the defendants, and two previous trials having resulted in the same way, the court refused to set the verdict aside.

This was an action brought by plaintiffs as executors of one Dr. Lynds, to recover from defendants a balance alleged to be due on a mortgage made by defendants to plaintiff's testator. The only dispute was as to the sum of \$35, which David Hoar, one of the defendants, alleged he had paid to King, one of the plaintiffs, and for which he held his receipt. On the trial of the cause, which took place at Truro before SMITH, J., October 2nd, 1883, King swore that the receipt held by David Hoar was given by him under the impression that a bill given to him by the defendant with others to make up a payment of £40 was a £10 bill, whereas it proved to have been a bill for only \$5. The learned Judge charged the

jury that the preponderance of evidence was in favor of the plaintiff, but that the credibility of the witnesses was entirely with them. The jury found a verdict for defendant and the cause now came up on a rule to set the same aside. The cause had been tried twice previously, and on both occasions verdicts were rendered for the defendants, but were set aside on various grounds. (See 1 R. & C., 327; 2 R. & G., 237.)

Graham, Q. C.—The rule should have been returnable before the Equity Judge; *Revised Statutes*, (4th Series,) chap. 95, sec. 33; *Ritchie's Equity Decisions*, 26. By section 1 of chapter 95, all equity cases are to be assigned to the Equity Court. By section 39 of chapter 95 suits in relation to mortgages are to be dealt with in that Court. Whenever the words Supreme Court appear, and it is a Chancery matter, the Equity Court has exclusive jurisdiction. Chapter 103, *Revised Statutes*, has nothing to do with the foreclosure of mortgages.

Sedgewick, Q. C., in reply, cites *Lynds v. Hoar*, 2 R. & G., 237. The case as now before the Court is not distinguishable.

King, in support of rule.—As to the power of the Court to set aside verdicts as against weight of evidence, cites *Canadian Bank of Commerce v. McMillan*, 31 U. C., Q. B., 596; *Davies v. Roper*, 33 E. L. & Eq., 511; *Barteaux v. Cobequid Insurance Co.*, L. R., 6 P. C., 319; *Kearney v. Kearney*, 1 R. & C., 248.

MCDONALD, J., (March 31st, 1884,) delivered judgment as follows:—

The defendant executed a mortgage deed to the late Dr. Lynds, one of whose executors was Mr. John King. The latter was entrusted with the collection of the amount due under the mortgage, and, on the 9th day of January, 1871, he gave the defendant a receipt for £40 towards the balance due. According to the evidence of Mr. King, as given in this cause, what he supposed to have been a £10 bill turned out to have been only a \$5 bill, making a difference of about \$35. This action is brought to foreclose the mortgage, and the defendant, having paid into Court all the balance claimed except the difference mentioned, the question now is whether or not, at

the time the receipt was given, there was such a mistake made as is now alleged by Mr. King,—that is, taking a \$5 note for a ten pound one. At first Mr. King appears to have been impressed with the conviction that, instead of such being the case, the ten pound note was actually handed to him by the defendant and afterwards stolen by the latter out of the parcel of notes which remained, as he said, within reach of the defendant while he, King, was in the act of writing a receipt for the amount. Before this action was commenced the defendant was arrested for larceny of the £10 note, but was acquitted, Mr. King being the principal witness against him. Mr. King's deposition, then taken, was put in evidence in this suit and by it he is represented as having testified that he actually did receive the £10 note—that "ten pounds was written in printed letters about two-thirds of the way down, from the top to the bottom" of the note; that he was convinced Hoar only paid him seven notes, and that one of them was a £10 note; and, further, that he was satisfied that the ten pound note was stolen while he was writing the receipt, and that the \$5 note was placed in its stead. He then said: "I have no doubt whatever that Mr. Hoar stole the £10 note and replaced it with the \$5 note." He now thinks, however, that, although the defendant told him one of the bills was a £10 bill, yet it turned out after he got the receipt and left the office, that it was but a \$5 bill,—there being no ten pound note in the parcel, and he thinks he was mistaken in the evidence which he gave when the defendant was prosecuted for larceny; and that, in point of fact, no ten pound note had passed at all, although the defendant deceived him by saying that there was one. Of Mr. King's integrity in this transaction I have no doubt, but it is evident that his recollection is, and has been at fault, and I would be disposed to think that his first statement, made by him within a few days of the transaction, would be more reliable than the last, which, as he himself admits, is based upon hearsay. His words are: "I came to the conclusion that there had been no £10 given me from what I heard he said to others." There was but one other witness (Miller) in the room in which the transaction took place, and his evidence is of no importance, except that he corroborates

Mr. King as to the number of notes that were passed; but that evidence would have been equally strong in corroboration of Mr. King's first impression, as given in the larceny case; and the jury in this cause might well have thought that it was a case of larceny after all, and not simply of non-payment. There is some evidence of admission which, however, is contradicted, and the whole was fairly left to the jury;—if anything, rather favorably to the plaintiff; and the question having been already tried several times, invariably with the same result, I do not think we ought to interfere too much with the functions of the jury, as we would be doing, if we disturbed this verdict.

MCALLISTER ET AL. v. FORSYTH AT AL.

Before McDONALD, JAMES, WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided March 31st, 1884.)

Bill of sale.—After acquired property.—Specific performance.—Fraud.

G. D. being indebted to the plaintiffs, as security for the payment of his indebtedness in instalments as agreed upon, executed a mortgage to plaintiffs of his stock in trade, and agreed to convey to them "all stock, which, during the continuance of the indebtedness, he might purchase for the purpose of substituting in place of stock then owned by him in connection with his said business." At the time of the making of the mortgage, in order not to affect G. D.'s credit, it was agreed that the mortgage should not be recorded until default was made. After default and the recording of the mortgage, G. D. executed an assignment of his stock, debts and all other property to the defendants in trust for the general benefit of his creditors. Defendants delivered to plaintiffs certain stock which they alleged to be all that remained of the original stock, and plaintiffs having brought a bill in equity to compel the defendants to transfer to them the balance of the stock assigned and for other purposes;

Held, per RIGBY, JAMES, and McDONALD, J. J., WEATHERBE, J., dissenting, that the contract in regard to the after acquired goods, was so uncertain that the court would not decree its specific performance.

Per WEATHERBE, J.—An agreement not to record a bill of sale is not a fraud.

This was an appeal from the following decision of JAMES, J. :—

The bill sets out that on the 8th day of May, 1880, the defendant, George Davison, a crockery-ware merchant in Halifax, being indebted to plaintiffs in \$7795.22 for a balance of advances made to him to enable him to purchase his stock in trade and to carry on his business, executed to the plaintiffs

a mortgage of his stock in trade as a security for payment of the amount with interest by twelve quarterly payments of \$649.60 each. It was stipulated in the mortgage that in case of any default continuing for fifteen days the whole should become due. Davison also agreed to convey to the plaintiffs "all stock which, during the continuance of the indebtedness, he might purchase for the purpose of substituting in place of stock then owned by him in connection with his said business," that, until default, Davidson should have the right to retain possession and sell the goods in the ordinary course of business, but, upon default, the plaintiffs should have power to enter and take possession and sell the goods to pay their debt, and, after payment, to pay the balance to the defendant. There were other covenants set out, the most material of which was that Davidson "would at all times thereafter, upon request, give to the plaintiffs all such transfers or conveyances as they might reasonably require for the purpose of conveying to them all such stock in trade as he at the time of such request might possess, or own, or have any interest in" in order most effectually to secure the plaintiffs' debt. The bill further sets out that Davidson made default in payment; that there was due to the plaintiffs on the 13th December, 1881, \$7777.94, the whole of which, on account of such default, was due and payable; that on said 13th of December, Davidson represented that he was unable to pay the debt, requested plaintiffs to take possession of his business, and offered them an assignment of the stock and debts, which plaintiffs refused, but an agreement was come to between them; that on the following morning the plaintiffs went to take possession but found the defendant Forsyth in possession, claiming under an assignment to him for benefit of Davidson's creditors made the previous day, and which was filed and registered on the following day, 14th December; that the mortgage was filed previously, (in fact, as appears by the evidence, on the 12th December,) and that Davidson had notice previously of the plaintiff's mortgage. The bill admits receipt from Forsyth of a certain part of the stock which he alleged to be all that remained of the original stock, which the plaintiffs deny. The bill prays a transfer to them from

Forsyth of all the stock on account of the amount due plaintiffs, that Forsyth be ordered to pay the same, and in default that the plaintiffs' mortgage may be foreclosed and declared to be a security to the plaintiffs upon all the stock in the premises; that an account be taken of the goods sold and that Forsyth be decreed to make it good; that a restraining order may issue and a receiver be appointed and other relief given.

The answer *inter alia* sets out that it was expressly stipulated, at the time of the making of the mortgage between the plaintiffs and the defendant Davidson, "that it should not be recorded or filed until default was made," the object of which was that the mortgage should be held secretly by the plaintiffs, as the publication of the fact might seriously injure the defendant Davidson's credit and prevent his continuing his business, and the important statement that a large amount of indebtedness was incurred by Davidson in the interval between the making of the mortgage, 8th May, 1880, to 12th December, 1881, when it was recorded—to parties who supplied him with stock for his business, such stock having been supplied by parties ignorant of the mortgage to the plaintiffs—that the amount of stock then remaining in the business was less in value than when the mortgage was made, being only about \$3,600—that the whole of the old stock then remaining was worth only \$250.00, and this, before the filing of the bill, was delivered to and received by the plaintiffs; that Davidson had paid to the plaintiffs, in the interval between the making of the mortgage and its registry, in December, 1881, on account of the debt, the sum of \$2,598, and that Davidson was disabled from paying any more to the plaintiffs by the registry of the mortgage contrary to their agreement with him, and the consequent destruction of his credit; that he learned the fact of the mortgage having been registered on the previous day, the 13th December, and forthwith, after some negotiation with plaintiffs made an assignment of the stock, debt and all his other property to Forsyth for the general benefit of his creditors, about \$1,100 being for preferential creditors.

It appeared by the evidence that in May, 1880, the whole indebtedness of Davidson to plaintiffs was about \$14,000—that

he owned some real estate worth \$4000, which the plaintiffs took from him at \$6000, and took the mortgage on his stock for the balance of nearly \$8000.00, the whole of the stock not being worth more than \$5000; that Davidson had some debts due him which were not included in the mortgage, the amount of which is not given in the evidence; that after the bill of sale he made payments, and got some further advances occasionally, but made default in the fourth instalment in May, 1881, after which he did not pay anything more to the plaintiffs. He says, however, that he paid some \$3000 of old debts out of the business. The plaintiffs did not then take possession but allowed him to go on with the business until December 12th, 1881, when they recorded their mortgage, which had the immediate effect of breaking up the business by destroying his credit. It appeared by the evidence of Davidson, and of the plaintiff Barnstead himself, that the defendants were fully borne out in the statement in their answer, that at the time of the making of the mortgage there was a secret understanding between the plaintiffs and Davidson that the mortgage should not be recorded lest it should injure Davidson's credit. The plaintiffs might consistently with their promise have recorded the mortgage in May, 1881, when the default occurred, but they did not, for the reason given by the plaintiff Barnstead, that they had promised to give Davidson "all the chance we could,"—that is, of course, a chance to get credit from other people to keep up his stock. If there is anything clear in the case it is that, knowing Davidson to be insolvent when they took the mortgage, not only of all the stock then in the premises, but of all that he should purchase afterwards on credit from other people, they made a secret bargain with him to assist him in buying goods on credit to put in his shop and become liable to their mortgage, and for that purpose to withhold their mortgage from registry. They also did not give any other notice which could injure his credit;—the secret was very carefully kept by both parties for over nineteen months, and consequently Davidson's credit remained unimpaired until that time, and he purchased a large quantity of goods from parties thus kept in ignorance, so that when they did record

the mortgage Davidson was indebted to these other parties in the sum of \$6000. The goods thus purchased on the false credit expressly given to Davidson by their contract with him are the goods which the plaintiffs now claim under their mortgage and which they seek the aid of this court to enable them to realize so as to leave nothing for the creditors from whom they were purchased.

Now I quite agree with the plaintiffs' counsel that the mortgage on its face is not only strictly legal, but a very well drawn instrument. It is true it gave a preference to one creditor over others, but that is consistent with the law, and it is also in my judgment true that the covenant to convey does not modify, weaken or control the previous conveying clauses; those were sufficient to convey the goods then in hand but not sufficient to give a legal title to goods subsequently acquired. Had the plaintiffs asked for and obtained subsequent conveyances of the new goods as they came in they would have had a legal title and could have brought trover for the goods instead of coming to this court for assistance. Their justification for coming is that they have no legal title, but that they have an equitable title because equity holds that what ought to have been done must be considered as having been done. There ought to have been a subsequent conveyance to give the legal title, but the plaintiffs claim that, as there was no such conveyance, this court must—on the authority of *Holroyd v. Marshall*, 10 H. L., cases 101, and several other cases, including the latest, *Clements v. Matheson*, 47 Law Times (Jan. 6th, 1883)—recognize the equitable title, and give the plaintiffs a decree on that ground, unless there is something fraudulent in the transaction. To this extent I support the contention of the plaintiffs' counsel; there is nothing fraudulent on the face of the mortgage, and, unless there is some consideration outside of the mortgage to interfere, the plaintiffs must get the benefit of their mortgage. That which the defendant relies on is the secret trust connected with the mortgage as being a fraud upon the creditors who supplied the goods sought to be recovered in this suit. But the counsel for the plaintiffs contend that, admitting it to be true that the mortgage to the plaintiffs was fraudulent and

void as against Davidson's creditors, the defendants are not in a position to impeach it because the statute of Elizabeth only avoids a deed made to defraud creditors "as against that person, his heirs, &c., whose actions, suits, &c., are or shall be disturbed, delayed, &c.," and the defendants cannot avoid this deed because Forsyth, who is Davidson's assignee for the benefit of creditors, is not in the position of a judgment-creditor. No cases were cited but I called the attention of counsel to the case of *Moore v. Moore*, 1 R. & G., 528, and gave them a subsequent opportunity to discuss its bearing on the case. I am not only bound by this case, but, having been present at the first argument, I investigated the authorities and prepared an opinion in accordance with that delivered by a majority of the court. After that it had been re-argued, on account of the four judges having differed in opinion. But I think that a comparison of this case with *Moore v. Moore* will shew that that decision is not applicable to this case. In *Moore v. Moore*, the owner of a horse and other chattels made a voluntary conveyance to his son, and delivered possession to him for the purpose of protecting them from his creditors. Afterwards he became indebted to his daughter, and, in consideration of his debt to her, made a bill of sale to her of the horse, whereupon she brought trover for the horse; the court held that she could not take advantage of the statute 13 *Eliz.*, c., 5, because she had taken no "action, suit or other proceeding" to recover the debt. It was held of course that the statute 27 *Eliz.*, c., 4, which avoids voluntary conveyances as against subsequent purchasers for valuable consideration, did not apply because that statute is confined to conveyances of real estate; and the statute of 13 *Eliz.*, only protects creditors and others having "actions, suits, &c.," which are "delayed, disturbed, or hindered." There can be no question that that case was decided upon well established principles of law. This case would, at first sight, seem to sustain Mr. Sedgewick's objection that the defendant, Forsyth, is not in a position to claim the protection of the statute. But there are several important distinctions between that case and the case before me. In that case it was the plaintiff who claimed the protection of the statute. She

might have qualified herself to bring the action by taking judgment and execution for her debt, but she did not see fit to do so. The bill of sale to defendant was good as between the original grantor and grantee, but void only as against a particular class of persons, designated by the statute, of which class the plaintiff was not a member. But in this case it is the defendant who claims the protection of the statute against a fraudulent plaintiff. There the plaintiff went into court voluntarily; here he is dragged in by the compulsion of a writ of this court and put upon his defence. If the plaintiffs had been in possession, and the defendant had intended to proceed in trover for the goods, he must have first qualified himself by taking a judgment and execution. But the plaintiff does not wait for him to do this, but makes him a defendant and compels him to answer under oath. Has not the plaintiff, by taking this course, by making him a defendant, and compelling him to answer, waived the objection which he might have taken if he had waited for Forsyth to bring his action of trover? In *Moore v. Moore*, the defendant said that the plaintiff could not legally be a plaintiff, having no *locus standi*. Here the plaintiff, by his own act, makes Forsyth a defendant and requires, nay commands him to put in his answer. Can the plaintiff now say that the defendant shall be shut out from answering that the deed was fraudulent? It is not the defendant's status that is in question here. The plaintiff has given him a status by making him a defendant and the burthen is on the plaintiff to establish his own status by proving an honest title which the Court can uphold. How can the defendant, Forsyth, be a mere volunteer when he is in possession under a title?

I consider this an ample answer to plaintiffs' objection, but it is by no means the only one. Let us remember that the plaintiffs come into Court acknowledging that they have no legal title, and claiming the intervention of this Court to give them the benefit of a principle of Equity, without which they cannot recover. If their conduct in the transaction has been honest, they have a right, as I have already said, to the application of the principle that the Court will hold that to have been done which ought to have been done; that is, that

the defendant, Davidson, had given to the plaintiffs subsequent conveyances of the goods purchased by him to replace his stock as fast as such goods were purchased, in accordance with his covenants contained in the mortgage. But this, I think, the Court cannot do, because it would be aiding the plaintiffs to commit a fraud, and making this Court, whose peculiar duty it is to prevent and suppress fraud, an instrument in carrying out a fraud.

It is a maxim of the Equity jurisdiction that, "He who seeks Equity must do Equity." And it has been settled that a party coming into Court to set aside a mortgage on the ground of usury, can only succeed on the terms of paying the debt with legal interest. He cannot use the Court as an instrument to commit an injustice, even when the party asking the protection of the Court had violated the law and incurred the total forfeiture of his security. Surely the principle thus recognized and adopted by the Court applies with tenfold force to this case where the party plaintiff asks the Court, by the application of a beneficial principle, to aid him in carrying out, not merely an injustice or a hardship, but a fraudulent transaction against parties who are entirely innocent. If the usurer was entitled to mercy, still more the unfortunate creditors who are sought to be made the victims of the plaintiffs' fraud are entitled to plead that fraud in the answer which the plaintiffs have compelled them to put in. How could they honestly have suppressed so important a part of the transaction from their sworn answer, and when compelled to disclose it, why should they not have the benefit of it? If it had been against their interests it would have been evidence against them. Can the plaintiffs rely on such parts of the answer as are in their favor, and reject the facts which are against their interest on the ground that the defendants should have suppressed them? I have, therefore, no doubt whatever that the defendant, Forsyth, is entitled in this suit to plead, as he has done, the fraudulent conduct of the plaintiffs, if it be fraudulent.

Before leaving this question, I would remark that I purposely refrain from discussing the question whether the Statutes of Elizabeth were intended to interfere with or

diminish the ancient jurisdiction of the Court of Chancery in dealing with cases of fraudulent conveyances of property. It has been said by high authority that the Statutes of Elizabeth enacted no new principle, but that the principles of the common law would have been quite sufficient to have accomplished all the ends of the two statutes, had they not been enacted. If such could, with justice, be said of the common law, how much more forcibly could it be said of the Courts of Equity jurisdiction, the practice of which is not encumbered with technical difficulties which might have embarrassed the common law courts? May it not be justly argued that the Courts of Equity had original jurisdiction to decide and carry out all that these statutes have enacted, and that the object of the statutes was not to alter or restrict the jurisdiction of the Equity Courts, but merely to aid the common law courts and extend their jurisdiction by a statutable declaration of principles already recognized and acted upon in Equity? If these remarks are just the Courts of Equity may carry out all the remedies provided by the statutes as they did before they were enacted, without being bound by restrictions intended to limit the jurisdiction of the common law courts. But it is unnecessary for me in this case to pursue these remarks or to investigate by reference to authorities the soundness of the conclusions to which they would seem to point.

The principal question I have now to discuss is whether the mortgage to the plaintiffs—coupled as it is with a secret trust that it should not be recorded or divulged lest it should injure Davidson's credit—was fraudulent as against subsequent creditors. There are two grounds on which the plaintiffs' conduct may be impeached as fraudulent, first, the promise of secrecy, and secondly, the leaving of Davidson in possession after a breach had occurred in May, 1881, and until December 13th, 1881. There is no possibility of question as to the intent with which this was done. Both the defendant, Davidson, and one of the plaintiffs state positively the intent. This was to enable Davidson to obtain credit to carry on his business and obtain goods from other parties, the goods thus obtained on credit from parties kept in ignorance of the mortgage to become subject to mortgage so soon as they were delivered to Davidson.

It was argued before me that the plaintiffs were very good people, who would not on any account commit a fraud, but how am I to know this but by actions? We cannot, although invited, look into their hearts. The question is was the thing they did fraudulent. The necessary and inevitable consequences of Davidson getting the credit he desired must be to increase their security, and by such means to increase their security would be a fraud. If not, if they had any other intention, why do they now seek to get possession of these goods? They cannot get them without working fraud. They cannot fully accomplish this fraud without the aid of this Court. They come to the Court virtually saying, "we tried to commit a fraud for nineteen months, but we cannot succeed because we omitted a necessary step. But this Court can supply the deficiency and enable us to consummate the fraud."

I have not called the secrecy of the transaction and the leaving Davidson in possession, *badges* of fraud; they constitute direct *acts* of fraud and the coming of the plaintiffs into court to ask the aid of the court to assist them in thus transferring the property of innocent creditors in actual ignorance, and designedly and by solemn contract kept in actual ignorance of the plaintiffs' mortgage, into their own pockets, is an act, to say the least, disrespectful and derogatory to the court.

The bill will be dismissed with costs.

Graham, Q. C., and *Sedgewick, Q. C.*, in support of appeal. —Assuming the chattel mortgage to have been fraudulent as against creditors, the defendant, Forsyth, is not a creditor, and cannot avail himself of the statute to defeat the bill of sale. Forsyth takes no greater equity right than Davidson, his co-defendant had, being an assignee without value. An assignee under a trust deed is not in the position of an assignee in bankruptcy; *Burrell on Assignments*, p. 438; *22 Pick*, 231; *2 B. & Ald.*, 136. There is no difference between the withholding of the bill of sale, until the day it was recorded, and the giving of a bill of sale on that day in pursuance of a previous agreement. Defendant's only remedy would be by cross bill; *28 Beauv.*, 189. We had a legal title to a large part of the property.

Weeks, Q. C., and Henry, Q. C., contra.—Under the circumstances proved, the assignment was void under the Statute of Elizabeth, and, being so, the deed to Forsyth, if made *bona fide*, would pass all the property. It is not necessary that Forsyth should be a judgment creditor, because he is the party in possession, and is not attacking the bill of sale. After-acquired property would not pass under the terms of this deed. The property could not be identified; *Ritchie's Equity Decisions*, 155. The words are ineffectual to convey after-acquired property, because the contract could not be enforced in Equity. The property is not sufficiently identified; it is not ear-marked. The place into which the property is to be brought is not designated. Equity will only assume that to be done which is agreed to be done in cases where it ought to have been performed. The agreement was only to be executed on request. There is not a particle of evidence of a previous request to convey. The withholding, by the plaintiffs, of the bill of sale enabled Davidson to commit a fraud for which plaintiffs are accountable. Davidson's evidence shows that the bill of sale was withheld because it might affect his credit, and that he bought goods on credit after the date of the bill of sale. The intent of the parties is a simple matter of fact. The Judge has found adversely to the plaintiffs.

Sedgewick, Q. C., in reply.—An agreement to convey after-acquired property will be enforced if the property can be definitely ascertained. The property here was ear-marked in the deed, which shows that the goods were to be purchased for the purpose of being substituted for then existing goods in the store. The moment the goods are acquired for the purpose of being substituted, they pass. Where a description is too general it is worthless. The more specific it is the more likely it is to be upheld. The words here are quite as specific as in many cases that have been upheld. (WEATHERBE, J.—The sole question is whether an instrument given for valuable consideration is to be invalidated on the ground that the registry is postponed. The plaintiffs did not seek to acquire any advantage to themselves.) My contention is that where the bill is made *bona fide* the only risk the holder of the bill runs is the risk of a judgment creditor. There was no agree-

ment to withhold the bill of sale at the time it was made. *Jones on Chattel Mortgages*, sec. 320.

RIGBY, J., (March 31st, 1884), delivered judgment as follows :—

By Indenture dated May 8th, 1880, the defendant, George Davidson, to secure an indebtedness of over seven thousand dollars, conveyed to the plaintiffs certain personal property described in the conveyance as "all the stock in trade, chattels and effects now being in the store of the said party of the first part, in Granville Street, in the City of Halifax," and the grantor agreed "to convey to the said parties of the second part, all stock which, during the continuance of the said indebtedness, he may purchase for the purpose of substituting in place of stock now owned by him in connection with his business." It was stipulated that the indebtedness, thus secured, should be paid in three years by twelve equal instalments, and that, until default, the grantor should be entitled to retain possession of and sell the goods. On the 13th of December, 1881, Davidson made an assignment to the defendant, George E. Forsyth, of "all the said George Davidson's lands, tenements and hereditaments, goods, chattels, merchandize, stock in trade, debts and sum and sums of money, due, owing or belonging unto the said George Davidson, and all securities had, taken or obtained for the same;" in trust, after the realization thereof, in money, to pay in full certain specified creditors, and then to pay in equal portions such debtors as should execute the document within sixty days. On the 14th of December, 1881, the plaintiffs, claiming that Davidson had made default in the payment of the instalments under the deed to them, and, as they allege, in pursuance of an arrangement with him to that effect, proceeded to his place of business on Granville Street to take possession of his stock, and found the defendant, Forsyth, in possession of the premises and stock, who, claiming under the assignment to himself, refused to acknowledge their claim. This action was thereupon, brought on the Equity side of this Court, the plaintiffs setting up a right to all the goods on the premises of Davidson, on Granville Street, at the time of the assign-

ment to Forsyth. The answer of Forsyth sets up certain alleged frauds in connection with plaintiffs' title, and the issues thus raised were found by the learned Judge in Equity in favor of defendants, and he dismissed the bill with costs. From this decision the plaintiffs have appealed. In addition to the defence already alluded to, defendants set up in their answer that all the property covered by the conveyance to plaintiffs, which was on Davidson's premises at the date of such conveyance, and had not been disposed of at the time of the assignment to Forsyth, had been delivered to and accepted by plaintiffs after the latter assignment, and before this action. This is fully substantiated by the evidence, which, in reference to these allegations, is uncontradicted; and it is abundantly clear that the only property claimed by the plaintiffs in this action was acquired by Davidson subsequently to the conveyance to them; and if that conveyance does not give them a right in Equity to such property, they cannot succeed in this action. Mr. *Benjamin*, in the 2nd edition of his treatise on *Sales of Personal Property*, at page 64, discusses the effect of an agreement for the sale of property to be afterwards acquired, and shows that, though at law it would be void, yet that in Equity it would, if the description was sufficiently specific, transfer the beneficial interests in the chattels as soon as they were acquired by the grantor. The author refers to the leading case of *Holroyd v. Marshall*, 10 House of Lords Cases, 191, in which the owner of certain machinery conveyed it in trust by a deed which contained a covenant that all the machinery which, during the continuance of the deed, should be placed in the mill in addition to, or substitution for the original machinery, should be subject to the same trusts. Some of the original machinery was sold and new purchased and brought upon the premises, and it was held by the House of Lords that the latter became subject to the trusts of the deed. Mr. *Benjamin* proceeds to say that the Barons of the Exchequer, in the case of *Belding v. Read*, 3 H. & C., 955, held that the doctrine of *Holroyd v. Marshall*, only applied to subsequently acquired property when so specifically described as to be identified.

BRAMWELL, B., in the latter case at p. 964, says:—"Mr.

Keane relies * * on the earlier part of the deed, which purports to convey all future, as well as present property, and contends that by virtue of it the defendant has acquired the the beneficial interest in all the assignor's after-acquired property. The effect of this would be that the moment the assignor acquired any property within the Kingdom, his assignee would at once acquire a beneficial interest in it. But the case of *Holroyd v. Marshall*, which has been relied on, does not, I think, establish that proposition. There machinery which in a sense was not specific when the deed was executed, having become specific by being brought into a particular mill and made a part of its machinery, it was held that, although the added machinery was not in existence when the deed was executed, a covenant or grant of this nature would confer an equitable interest in it." The authority of *Belding v. Read* seems never to have been questioned, but it has several times since been recognized and distinguished from cases decided upon the authority of *Holroyd v. Marshall*. In *Lazarus v. Andrade*, 5 C. P. Div. 318, the assignment was of property then in certain specified premises, and also the stock in trade, which should or might at any time during the continuance of the security be brought into the premises either in addition to or in substitution for stock in trade therein at the date of the assignment. In that case LOPES, J., said that the ground of the decision in *Belding v. Read* was that the description "all other the personal estate and effects whatsoever now being or hereafter to be on the premises or elsewhere in the United Kingdom," was so vague that it did not entitle the claimant to institute a suit for specific performance of the contract. Neither the character of the property nor its whereabouts was indicated, and there was nothing to ear-mark it. "In this case" he goes on to say, "the property is to be brought into the premises or to be appropriated to the use thereof, in addition to or in substitution for property then on the premises. I think the assignment sufficiently specific, the property in question having become specific by being brought on to the premises in addition to or in substitution for property mentioned in the schedule." The same Judge also decided the case of *Clement v. Matthew*, 47 L. T.,

N. S., 251, in which growing crops in and about certain specified premises were assigned and also the growing crops which, at any time thereafter should be on or about the same or any other premises of the grantor during the continuance of the security. "The question in all these cases," says the learned Judge, "is whether the property to be after-acquired is so described as to be capable of being identified. Here there can be no difficulty in identifying the crops growing on the farm. The crops became specific and capable of being identified by their growing on the premises, and the contract with regard to them, is one which a Court of Equity would specifically enforce. This case is distinguishable from *Belding v. Read*, because, in that case, the horse and trap were never on the premises, and there was nothing to ear-mark them."

If, in the case under appeal, the goods to be after acquired were described as goods which during the continuance of the indebtedness should be brought upon the premises of Davidson in Granville Street, in addition to or in substitution for the goods conveyed, then these cases would be authorities for holding that goods so brought upon premises so specified would be covered by plaintiff's bill of sale, and in reference to them a Court of Equity would decree specific performance. But the description before us is far from being so specific, for the goods which Davidson agreed to convey to plaintiffs were such as he might purchase for the purpose of substituting in place of stock then owned by him in connection with his business. In other words, the goods to be conveyed are to be ascertained by the purpose of Davidson in purchasing them, and no matter in what part of the world such purpose should be accomplished. This is a contract so uncertain that a Court of Equity would not decree its specific performance,—the property is no more particularly designated than that which was the subject matter of the decision in *Belding v. Read*.

I am, therefore, of opinion that the appeal should be dismissed with costs.

McDONALD, J., concurred.

JAMES, J.—While I perfectly agree with the very conclusive opinion of my brother RIGBY on a different branch of

the case from that on which I founded my judgment, I remain of the opinion as to the moral aspect of the case indicated in the judgment appealed from, with a slight modification. It was a good deal discussed at the argument whether I was right in holding the conduct of the plaintiffs to have been fraudulent. They have sworn, and they are said to be very respectable people, that they had no fraudulent intention. Yet, persons have been, in a multitude of cases, held to have committed fraud without any actual intention to injure others. Frauds of this character are called legal frauds, that is, fraud conclusively presumed from certain facts independently of the actual intentions of the parties. I make these observations for the purpose of saying that it was not necessary for me in my judgment to have imputed to the parties this legal fraud, nor indeed anything which the law calls fraud. My judgment is upon the ground that "he who seeks Equity must do Equity." If a party calls upon the Court to put in operation a principle of Equity for his protection, he must come offering to do that which Equity requires at his hands, and that in this case would be to pay the debts contracted by Davidson by means of the false credit given to him by the secret bargain between the plaintiffs and Davidson. If this had been offered there need have been no contest. Their conduct was surely inequitable towards the creditors, if not fraudulent. I think it would have been quite sufficient and more consistent with my view of the facts of the case if, instead of the words "fraud" and "fraudulent," I had used the words "want of equity," and "inequitable." There are a few words at the beginning of my judgment at variance with the conclusion at which I have now arrived, as to the plaintiffs equitable title under the bill of sale; but I did not intend to, and did not decide upon that ground. Indeed, I did not look into that branch of the plaintiffs' argument as I intended to decide upon another ground. The expressions used, which I ought to have expunged before reading the judgment, were rather used hypothetically. I assumed the plaintiffs' position for the purpose of my argument, rather than decided in its favor.

WEATHERBE, J.—The words in the instrument before us are different from those in any of the cases I have seen.

Davidson, who was carrying on business in Halifax, had agreed to convey to plaintiff, besides goods that were on the premises specified, all such as he might purchase for substituting in place of stock then owned by him in connection with his business. There can be no objection, I think, to these words sufficiently identifying the property to be acquired by reason of the identity being dependent on the purpose, (though I had a different impression at the argument,) for which Davidson was to purchase them. I have, I think, found direct authority for that in *Brown v. Bateman*, L. R., 7 C. P., 280, where it was held that the description of all materials to be brought to certain places for the purpose of erecting specified buildings was sufficient to create the interest sought to be established here. BOVILL, C. J., said:—"It is not necessary to say whether that clause creates an express legal interest in the landlord, because, in my judgment, it confers upon him a clear equitable right to the materials brought upon the premises for the purpose of being used in their construction, without any actual interference on their part." Here the interest would depend, it seems to me, upon a distinction which would have to be drawn between those goods brought on the premises which were for the purpose of going into the building, and those which might be for a different purpose altogether. Then, if goods were bought by Davidson for the purpose of substitution, a Court of Equity could ascertain that purpose, and that phrase in the description would afford no objection to the creation of the interest contended for here, which we ought not to deny, unless the language is otherwise vague. The question was asked at the argument whether goods purchased by Davidson abroad could be vested by the equitable principle governing the cases relied on at once. There can be no doubt that if they were described as to come by specified ships, that would be sufficient. In a leading American case cited by *Benjamin on Sales*, *Brett v. Carter*, 2 Low., 458, LOWELL, J., said: "It is undoubtedly the law of Courts of Equity, that after-acquired chattels definitely pointed out, as for instance, by reference to the ship, mill, or place into which they are to be brought, may be lawfully assigned as security." It is clear enough in this case that all

goods are to be excluded by the very terms of the description, except such as were for substitution for other goods then actually owned by and in possession of Davidson in connection with his business. And this could be ascertained definitely by evidence, no doubt, and in fact the evidence in the case shews that the goods in question were such goods. I suppose it will be admitted that if the words, "in connection with his business," were followed by the words, "in his store in Granville Street," there would be no doubt. Under these words, in this part of the agreement, if the business is not confined by express words to any premises, it must be evident that all premises and places are, by the description, excluded, except where, at the date of the instrument, he then actually had goods with which he was carrying on his business. Before enquiring whether there are any words in the conveyance to show where the place of business was, let us ask ourselves whether the words are sufficient without anything to aid them. Suppose the description was of "all stock to be substituted in place of stock now owned by me in all my several places of business." In *Clement v. Matthew*, 47 L. T., N. S., 251, where growing crops on specified premises were conveyed, and, in addition, the growing crops which at any time thereafter should be on or about the same or any other premises of grantor, although a crop growing on or about premises is unsatisfactory, if not vague, it was held there would be no difficulty in identifying the property. I think *Lazarus v. Andrade*, 5 C. P. D., 318, much like the present case. The bill of sale conveyed "the stock in trade then in certain specified premises, and also the stock in trade which should or might at any time during the continuance of the security, be brought into the premises either in addition to or in substitution for stock in trade therein at the date of the bill of sale." LOPES, J., said: "In this case the property is to be brought into the premises or to be appropriated to the use thereof. * * *

I think the agreement sufficiently specific, the property in question having become specific by being brought into the premises in addition to or in substitution for property mentioned in the schedule. *Belding v. Read* has a good many loose expressions, but it is cited in vain, apparently,

except to limit, (and for which it is a leading and striking case,) *Holroyd v. Marshall*, and show that the decision of that case was not intended to show that a contract for the sale of future acquired chattels transfers the beneficial interest as soon as they are acquired by the vendee of property *generally*, but only property *specifically* described. And it goes no further than to show that the description is sufficiently specific if the property can be identified by applying the description in the instrument, by evidence, to the chattels in question. The description in *Belding v. Read*, 3 H. & C., 955, includes all the personal estate and effects whatsoever now being or hereafter to be upon the premises described, or elsewhere in the Kingdom of Great Britain, which is as general and absolute as it well can be, and certainly at any rate quite different from this deed from Davidson. Moreover, it will be found that the decision in *Belding v. Read*, which is mentioned without explanation by Mr. Benjamin. when carefully examined, may not be held to go quite so far as is contended it ought to be carried.

BRAMWELL, B., said:—"But the case of *Holroyd v. Marshall* which has been relied on does not, I think, establish that proposition. There machinery, which in a sense was not specific when the deed was executed, having become specific by being brought into a particular mill and made a part of its machinery, it was held that, although the added machinery was not in existence when the deed was executed, a covenant or grant of this nature would confer an equitable interest in it. But here, (that is in *Belding v. Read*,) the property acquired after the bill of sale was executed has never become specific so as to form the subject of a decree for specific performance. I think that case does not govern the present. Moreover, reading the whole of this deed together it would not seem to have been the intention of the parties that the defendant should acquire a beneficial interest in the after acquired property until after a demand for payment had been made." Anything further affecting the point before us except that the description before the Court of Exchequer was too general, decided in that case would be, I think, *obiter*. And nothing more satisfactory has been said of descriptions held

not specific where that case has been relied on than that they were too "vague," a not very instructive expression to the legal or logical sense of the enquirer. I think it will be admitted the line has never been drawn. It has never yet been defined so as to exclude a description such as the one now considered. The words describing the property conveyed are in our deed here:—"All the stock in trade, chattels, and effects now being in the store of the said party * * * in Granville Street in the city of Halifax;" then the agreement binds Davidson "to convey to the said parties of the second part all stock which during the continuance of the said indebtedness he may purchase for the purpose of substituting in place of stock now owned by him in connection with his business." If the word "said" had been inserted before the word "business" I doubt whether there would have been much room for the argument which was addressed to us. If the question had arisen in this case as to property purchased for substitution in the business, but not yet brought upon the premises, I could quite well understand the contention of the defendant then that no beneficial interest could be acquired by plaintiff under the words of description here until the goods were actually substituted, as such an intention from the words taken together may be fairly contended to embrace the views of the parties. The purpose of the purchase of goods in the ordinary sense of that word might be impossible to ascertain—nay might be impossible to be known to the purchaser Davidson himself. In *Brown v. Bateman* the court held "material brought for the purpose of the building," the same as if the purpose was not mentioned. The words "to be purchased for the purpose" are there held to convey the idea of future acquired goods. "Goods brought for the purpose of being substituted for present stock now used in the business;"—is that anything more than goods to be acquired and substituted for the goods now in existence? The word purchase read with the words which follow it may fairly be urged was intended should be limited by the actual depositing of the new goods in the place of the old ones. And I should find as a matter of fact, in testing whether the description was vague, that this was the actual intention of the parties to the

agreement; and I would not be able to say that, without the insertion of the word, "said," or, "aforesaid," between the last two words of the description,—“his business,”—the plaintiff's interest would not be confined to stock in the place of business in Granville Street, previously described, and not extended to other places of business even if Davidson could be shown to have had other places, as in the case of crops on any of the farms, the subject of discussion in *Clement v. Mathew*. It was not disputed, at the argument, that plaintiffs had a right to enforce their equitable lien against the assignee unless they are guilty of fraud, and the only fraud alleged was that they had agreed not to record the bill of sale. I never understood and no authority was produced to show that to be a fraud. It is not a fraud in England and our statute does not make it fraudulent, and, but for the statute, there would not be even an opportunity of registry. These two questions were the only ones presented at the argument. With upwards of fifty undecided cases before me for consideration, I have had but little opportunity, in the few days afforded, to give the attention to this case that some of my brethren have given, and it is possible some point not raised at the argument may have escaped my attention. I regret that I had not an opportunity, owing to the number of cases in decision, of conferring with my brother JAMES who I understand now has modified his views respecting the ground of fraud, and it seems he has not changed his mind on the other point in which I support what is stated in the judgment appealed from.

issued, was, in point of fact, untrue. On the 20th December, 1875, Strong made an assignment under the Insolvent Act of 1875. On the 21st January, 1876, a deed of composition and discharge was executed by his creditors, and, on the same day, the official assignee executed the statutable transfer of the insolvent estate to Jenkins, the assignee chosen by the creditors. On the 5th May, 1876, Strong's discharge was confirmed by the Court, and on the 15th of the same month Jenkins executed the statutable transfer of the estate to him. On the 8th March, 1876, while still an insolvent, Strong executed to Jenkins, the assignee of his estate, a bill of sale reciting an agreement on the part of Jenkins to advance to the said Strong goods amounting to the sum of five thousand dollars. In pursuance of the said agreement and in consideration of the sum of four thousand dollars paid by the said Jenkins to the said Strong, the said Strong assigned to the said Jenkins, his executors, &c., all and singular the stock in trade, household furniture, hardware, dry goods, chattels and effects, in or about or belonging to the store of the said Strong, situate at Berwick aforesaid, more particularly described in the schedule thereunto annexed and also all the stock in trade, household furniture, hardware, dry goods, chattels and effects, "which shall or may at any time or times during the continuance of this security be brought into the aforesaid dwelling house and store of the said Strong, either in addition to or in substitution for the stock in trade, household furniture, hardware, dry goods, chattels and effects, in or about or belonging to the store of the said Strong, situate at Berwick aforesaid," subject to the following proviso for redemption: "Provided always, and it is hereby agreed and declared, that if the said Strong, his heirs, executors, or administrators, shall on demand pay to the said Jenkins, his executors, administrators, or assigns, the sum of four thousand dollars, then and in such case the said Jenkins, his executors, administrators, or assigns, shall, upon the request and at the cost of the said Strong, his executors, and administrators, re-assign the chattels and premises hereby assigned or expressed so to be unto the said Strong, his executors, administrators, or assigns, or as he or they shall

direct. And in the meantime, and until default shall be made in payment of said money, or after payment thereof shall have been demanded by or on behalf of the said Jenkins, his executors, &c., the said Strong shall retain possession of the said stock in trade, household furniture, hardware, dry goods, chattels and effects."

Jenkins continued to hold this bill of sale till the 12th of January, 1877, when it was released or discharged, and on the same day Strong executed an absolute bill of sale to Henry Howard, in consideration of the sum of three thousand dollars, of all the goods, wares and merchandise, household furniture, office and shop fixtures, and book debts, situate in and upon the dwelling house and store of the said John Strong, at Berwick, aforesaid, his executors and assigns, absolutely for his and their own use.

The bill of sale to Jenkins is, of course, alleged to have been given by Strong to Jenkins and received by the latter as the agent, and on account of the plaintiff. On these facts the defendant company contend they are not liable on a policy obtained on a misrepresentation of a material fact, and because the plaintiffs had no insurable interest in the property at the inception of the contract of insurance, nor such interest since that day as will entitle them to recover under this policy. It is admitted that there is no insurable interest till the date of Strong's bill of sale to Jenkins on the 8th March, 1876. At that time Strong was not in a position to convey any interest whatever to Jenkins or any one else, as he had assigned in bankruptcy on the 20th December previous, and was not repossessed of the estate till the 15th May following. At the date of the bill of sale to Jenkins, the grantor, Strong, was neither actually nor potentially the owner, nor in possession of the property professed to be passed by the bill of sale. He could, therefore, confer no title or interest in the property on Jenkins. Assuming for the present that property in the latter, so derived, could be held to be such a property in the plaintiffs as would confer upon them an insurable interest, it appears, from the evidence of Strong, that after and during his insolvency, with the knowledge and consent of Jenkins, creditors' assignee of the estate, goods were sold from the

store at Berwick, and other goods received from Jenkins, (as the agent of plaintiffs,) put into stock. It is impossible to ascertain from the evidence what quantity of goods was sold by Strong from the time of his assignment to the date of the bill of sale to Jenkins. The following is Strong's account of matters during that period :—

I became bankrupt in the year 1875. T. K. Jenkins was my assignee. As assignee he had charge of my business during my bankruptcy. I managed the business at Berwick myself. There was a clerk sent by Jenkins part of the time. I made sales and sent the money to Jenkins as assignee of my estate. I made sales and received money during my bankruptcy for said Jenkins, and sent the money to him. I entered into a composition with my creditors in 1875 for the purpose of obtaining a discharge. Of my own personal knowledge I do not know that Thomas K. Jenkins promoted or negotiated my composition with my creditors. I do not know that Thomas K. Jenkins paid the amount of my composition. I know that the amount was charged in plaintiffs' account against me. I do not know that T. K. Jenkins borrowed any money for the purpose of paying my creditors. I became liable to the plaintiffs for the amount of the composition. I borrowed it of the plaintiffs. I did not give Mr. Jenkins the bill of sale to secure the amount borrowed to pay the composition with my creditors. The bill of sale was made March 8th, 1876, and the money charged to me the 24th of April, 1876, in plaintiffs' account. I do not know what he was responsible for. I gave it to him as manager for the plaintiffs. Not all of the goods were sold and delivered to purchasers during that time. Certainly not all the goods were sold and delivered from my store at Berwick by me or T. K. Jenkins or persons in his behalf. I have no means of knowing what proportion of stock was sold during this time. During the time of my insolvency the goods were not all supplied by T. K. Jenkins. The goods were sold partly by myself and partly by clerks sent by T. K. Jenkins from the plaintiffs' store. The proceeds of the sale were mailed to Thomas K. Jenkins during my bankruptcy as assignee for my creditors. I sold goods in Kingston between

my bankruptcy and the date of the fire. I made the bill of sale before I purchased the goods in April. I know it was made on the 8th of March. I made no purchases of T. K. Jenkins except through him as manager for the plaintiffs."

There can be no doubt, therefore, that Jenkins, during the insolvency, was running the business and dealing with the property in the interest of the creditors and not of the plaintiffs, and that any distinct or personal interest in Jenkins as mortgagee cannot be asserted as against the creditors, whose trustee, at the time of the bill of sale to him, he was. However that may be, the interest of Jenkins, whatever it was, was released by him to Strong on the 12th January, 1876, and the bill of sale to the plaintiffs executed the same day. Now this bill of sale is not a mortgage but an absolute sale to the plaintiffs of all the right and interest of Strong in the property therein mentioned, and if, according to the argument of the plaintiffs' counsel, he must recover according to his interest at the time of the loss, his interest, it will be seen, was not that represented in the application for the policy, and on which it was issued. The interest insured was that of a mortgagee; the interest in proof at time of loss was that of absolute owner. It was argued that the renewal on the 5th of August, 1876, was a new contract, subject to, and based upon the conditions existing at the date of such renewal, and, therefore, that, admitting the want of interest when the policy issued, the renewal would create a contract of insurance from that date, based upon the mortgage bill of sale to Jenkins, then in force, and upon the subsequent bill of sale to Howard in January, 1877. Cases were cited from the several courts of the United States, some holding the renewal to be an original contract, while others held it to be a continuance and extension only of the first contract of insurance. Were it necessary to determine between these conflicting decisions, I would have no difficulty on principle in coming to a conclusion, which, if erroneous, would be corrected on appeal, and the true rule of decision thus established; but it appears to me, whatever be the correct view of that rule, the difficulty is removed here by the condition contained in the policy. The 12th condition endorsed

on the policy and which is a part of the contract, is as follows :—

“Insurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which, in all cases, it shall be incumbent on the party insured to make, when the risk has been changed, either within itself or by the surrounding or adjacent buildings.”

This condition has been violated in every particular :—

1. The plaintiffs were not mortgagees when the policy issued.

2. They were not mortgagees when the policy was renewed.

3. They were not mortgagees during the currency of the renewal up to the date of the fire.

4. The bill of sale or security to Jenkins, taken in connection with the dealings of Jenkins as assignee, (during the insolvency of Strong,) with the property, must clearly be held to have been a security for the creditors and not for the plaintiffs, if, under the facts in proof, the instrument was effectual as a security at all.

The last clause of the third condition of the policy is very explicit and imperative :—

“If the interest in property to be insured be a leasehold, trustee, mortgagee or reversionary interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void.”

I am of the opinion that there was no insurable interest in the plaintiffs covered by this policy, either when the policy was issued or at the time of the loss claimed, and that, on this ground, the plaintiff must fail.

The objection taken to the validity of the proof of loss furnished by the plaintiffs is, in my opinion, equally fatal to their claim. Indeed, it would appear sufficient to state the requirements of the policy in that particular and the nature

of the proof furnished, to establish the defendant's contention without the aid of argument.

The 9th condition of the policy requires:—

1. Notice of fire forthwith in writing by persons sustaining loss.
2. Particular account as case will admit, as soon as possible.
3. Signed by their own hands.
4. Oath or affirmation of truth of account and particulars.
5. Shewing whether any and what other insurance on same property.
6. Whole cash value of subject insured.
7. What the interest of insured, or claimant therein.
8. What manner occupied and by whom occupied.
9. How and when fire originated.

In *34 U. C., Q. B.*, 440, WILSON, J., said: "The accounts delivered showed that so much stock or merchandise was on hand before the fire and so much of it was sold, leaving so much after the fire, but do not show a particular account of the loss which is of the slightest service to the defendants. They want to know if any dry goods or clothing or groceries or crockery was lost or damaged, and the declaration that plaintiff lost stock or merchandise is not an answer, for there may not have been a single article of the special nature of goods which defendants insured lost or damaged, and it may yet be perfectly true that the plaintiff lost all the merchandise which he says he lost." And, referring to the third requirement of these defendants above-mentioned, HAGARTY, C. J., says:—"We do not see how a court of justice can deny to an insurance company the plain right of insisting, as a condition of their liability, that the person whom they undertook to assure, should, if a loss occur, pledge his personal faith to the honesty of his claims, nor how we can accede to the plaintiffs' argument that the assured can depute to another the pledge of personal veracity which the underwriter bargained he should make himself." *7 U. C. C. P.*, 217. The following is the proof of loss relied on:—

1. A certificate of a notary that the signature of the Justice of the Peace to the papers annexed purporting to be

the proof in case of loss, was in the proper handwriting of the said justice.

2. The following statement of Strong in reference to the fire which destroyed the store occupied by him :—" During the day on which the fire took place there was fire in the main shop ; also in the dressmaker's room above stairs. At the time of closing I looked around as usual and saw that all was apparently safe. There was some fire in the stove. In the shop I burnt coal. I closed the store about half-past nine. Mrs. J. A. Bent, Wm. Legg and George Bond left shop near the time of closing. After leaving store I went home. Some time elapsed when Mrs. Legg gave the alarm that there was a fire down the street. Immediately I went to ascertain where it was, and on approaching the corner saw my store in flames ; found on arriving at the store the door had been broken open ; commenced at once to save the goods. All effort was made by myself and those present to save the goods. I have no idea how the fire originated. Amount of stock at the time of fire was worth over three thousand five hundred dollars."

3. An affidavit of Strong as follows: "That on the 5th day of August, A. D., 1875, Messrs. S. Howard & Son, doing business in the City of Halifax as merchants, effected insurance in the Halifax, Nova Scotia, agency of the Lancashire Insurance Company, under policy No. 224,475, from loss against fire on a stock of dry goods and general merchandise contained in a two story wooden building owned and occupied by me as a general store, situate in the Town of Berwick, King's County, N. S., detached, and which said policy has continued to be and is now in force and will not expire until the fifth day of August next ; that said premises were destroyed by fire on the night of the 31st March, A. D. 1877. When the alarm of fire was first given by Mr. Legg, I was in my house. I hurried down the street and on reaching the corner discovered my shop in flames. I have no idea how the fire originated. It occurred through causes over which I had no control. I have made diligent enquiry to ascertain the origin, but without success. Every effort was made by myself under the circumstances to save the stock."

With one exception, the proof of loss gave no information on the points on which the defendants were entitled to a truthful statement of facts, that is "the whole cash value of the subject insured," which is stated at over three thousand five hundred dollars. Indeed, the weakness of plaintiffs' case on this point was so apparent that his counsel relied rather upon the alleged waiver by the defendants of any insufficiency or defect. The evidence of waiver relied upon is the following statement of the plaintiff, Howard :—

"George B. Sinclair is the agent of defendant, company. I called on him at his office on the 25th May, 1877, and spoke to him about this loss. Capt. Sinclair said he had sent the papers to England, and he could not make a settlement until he heard from there. He said he wondered how I could trust a man like Strong, and that it was a fraudulent fire. I said I could see no reason to think so, as the stock was in excess of the insurance. He required me to do nothing more, or furnish more than what I had. Mr. Sinclair did not make any objection to the proof of loss."

Pauley, the clerk of plaintiffs, said :—"I saw Captain Sinclair on Monday morning. The fire was Saturday night. He said he had seen an account of the fire in the newspaper, and that he would send up an agent to investigate the matter. I saw Capt. Sinclair a few days afterwards; he said there would be no delay in payment when the proper papers were produced."

I cannot conceive stronger evidence to rebut any intention on the part of Capt. Sinclair, defendants' agent, to waive his strict rights than this. To Howard he said he had sent the papers to England and he could do nothing till he heard from his principals. He went much further, however. He declared that the fire was fraudulent and expressed his surprise that plaintiff would trust such a man as he, Sinclair, thought Strong to be. Can it be imagined that Capt. Sinclair, while expressing such sentiments to the plaintiff, could have intended to defraud his company by waiving proof of honest loss, always required, but especially so in a case of suspected fraud such as Capt. Sinclair declared this to be? Capt. Sinclair discharged his duty and informed the plaintiff that he had

sent his papers, such as they were, to England, and he must abide the result. The evidence of Pauley is even stronger against any presumption of waiver. Capt. Sinclair declared to him that there would be no delay in payment when the proper papers were produced. Even if the objections to the proof of loss were of the most technical character, these conversations would afford no evidence of waiver; but where, as here, there is substantially no proof of loss, it would be monstrous to allow such a contention to override the rights of parties. I am, therefore, of opinion that on this ground also the plaintiff must fail.

The rule for a new trial will be made absolute with costs.

WEATHERBE, J.—The following is the language of one of the conditions of the policy upon which the suit is to be maintained under an issue raised directly by the pleadings: "Persons sustaining loss or damage by fire shall forthwith give notice thereof in writing to the company; and, as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed by their own hands; and they shall accompany the same with their oath or affirmation, declaring the said account to be true and just; showing also whether any and what other insurance has been made upon the same property, and giving a copy of the written portion of the policy of each company; what was the whole cash value of the subject insured; what was their interest therein; in what general manner, (as to trade, manufactory, merchandise, or otherwise,) the building insured, or containing the subject insured, and the several parts thereof, was occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, as far as they know." There are two affidavits furnished by the plaintiff to the company in alleged compliance with this condition. (His Lordship here read the affidavits of Strong set out in full in the preceding judgment, *ante* p. 180.)

Nothing further can be gathered from these affidavits than:—

1. The date of the fire in the shop and that the latter was totally destroyed.

2. The effecting of the policy in 1875 on goods in a building occupied by deponent.

3. The state in which the building was left on the evening of the fire.

4. The discovery of the fire and ineffectual efforts to discover its origin.

5. All efforts were made to save goods.

6. Amount of stock at time of fire was worth over \$3,500.

7. The affidavits are sworn by the occupiers of the shop.

Clause 9 of the policy already quoted requires, as soon after the fire as possible, to be delivered to the company:—

1. A statement by the persons sustaining loss or damage signed by their own hands.

2. With as particular an account of their loss and damage as the nature of the case will admit.

3. Accompanying the same with their oath or affirmation declaring the said account to be true and just.

4. Showing whether any and what other insurance has been made upon the same property.

5. Showing what was the whole cash value of the subject insured.

6. Showing what was their interest therein.

7. Showing in what general manner the building containing the subject insured and the several parts thereof were occupied at the time of the loss.

8. Showing who were the occupants of said building.

9. And showing when and how the fire originated.

As to these nine several requirements none of them with the exception of three, in any manner whatever, have been complied with. The only excuse offered for non-compliance was the absence of the plaintiff from the country; but there are two answers even to this:—

1. On the 3rd day after the fire the plaintiffs, whose place of business is in Halifax, in their name by their agents, gave notice of the happening of the fire.

2. The condition only contemplates that these requirements shall be complied with as soon as possible.

Neither the plaintiffs nor any one acting on their behalf or by their authority have furnished even what meagre information and proof has been made, and no excuse whatever has been offered for the absence of that information which, as I understand the law, was essential. There is one excuse, however, which counsel have urged which, if sustained, is ample to exempt the plaintiffs from the obligation imposed by the condition in question; namely, that the defendant company by renunciation and waiver exonerated and discharged the plaintiffs from compliance with the provisions of the ninth condition. Two pieces of testimony are relied on to sustain the replication of waiver. The fire was on Saturday night or Sunday morning. On Monday morning, and the day before the delivery of the notice of loss signed by plaintiff's agent in their name, James Pauley, cashier to plaintiffs, called on the agent of the defendant company when the agent said he would send up an agent to investigate the matter. Pauley testifies that he saw the agent "a few days afterwards. He said there would be no delay in payment when the proper papers were produced." The plaintiff, Henry Howard, who sometimes resided in England, had an agent, Jenkins, managing his business from 1874 to 1876. In April, 1876, the plaintiff, Henry Howard, returned to Halifax and remained till June of that year when he went to England and returned in the following September. He again went to England 22nd January, 1877, and returned to Halifax in May after the fire. He called at the office of the defendant company on the 25th May, 1877, and spoke to the agent of the company about the loss. In his evidence he says:—"Captain Sinclair said he had sent the papers to England and he could not make a settlement until he heard from there. He said he wondered how I could trust a man like Strong, and that it was a fraudulent fire. I said I could see no reason to think so as the stock was in excess of the the insurance. He required me to do nothing more than what I had. Mr. Sinclair did not make any objection to the proof of loss." As I understand this evidence the last two sentences are not intended as an allegation of any statements made by the agent. They are only intended to

represent negatively that he made no demand for better proof of loss. I understand they had no conversation on the subject of proofs of loss. And thus it was we had cited to us cases to show that silence on that subject and putting forward another ground for the refusal to pay amounted to a waiver. The conversation in effect was this. Plaintiff called for information about the claim and the agent informed him that he had submitted the latter to his principals in England and must abide their instructions. This was a clear intimation that the claimant was to be held at arm's length. The only proofs of loss which had been presented were the affidavits of Strong who the agent said was guilty of fraud; and these papers were sent to England. It was competent for the principals in England to accept these as sufficient, but all that passed at this conversation comes far short of representing anything that should induce a claimant to understand that no objections would be taken to the sort of proofs of loss upon which plaintiff relied under any circumstances. I think the doctrine of waiver and estoppel has been carried far enough. We are now asked to say that the agent of this company has by his language or conduct given the plaintiff to understand that the company would not insist on a compliance with the condition of the agreement between them which required a written statement under oath from the plaintiff as already specified. In the conversation referred to all that I understand Sinclair actually said was that he had sent the papers to England and could make no settlement till he heard from there, and he also said he wondered how the plaintiff could trust a man like Strong, and that it was a fraudulent fire. That was all. It is true he made no objection to the proofs of loss nor did he require further proof. Nothing was uttered by either party on that subject except that the papers were sent to England and that no settlement would be made without advice from England. The plaintiff is now relying on silence of the agent, who complained of a fraudulent fire;—that he did not point out the course that should be taken to make the company liable. That, I think, is carrying the principle of waiver further than ever it has been carried by any English court and further than cool reason dictates, and

I am unwilling to drag it to any such length or to go beyond what the parties themselves really intended at that interview. There is nothing whatever to show me that either the agent, Sinclair, or Howard, the plaintiff, had in contemplation, at the time of the conversation referred to, the subject covered by the ninth condition of the policy. It seems clear to me from the evidence that the plaintiffs were relying altogether on the affidavits and papers attached to the notarial certificate of their attorney which were presented to the agent of the company and put in evidence as sufficient preliminary proof of loss, and that the incident of the conversation now introduced was not the thing upon which the action was founded. The condition under consideration may be an unreasonable condition to insert in a policy. It may seem unfair to insist on it as a defence or there may be good reason for the interference of the legislature. To admit that these things should influence a Judge would be giving over the administration of the law to sentiment, caprice, and uncertainty. Holding the views I do on this part of the case it is unnecessary for me to discuss the other questions argued.

SMITH, J.—After having looked into the authorities I am satisfied that the verdict cannot be sustained.

JAMES, J., concurred.

GRAHAM v. MONAGHAN.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J J.

(Decided March 31st, 1884.)

Assessments for School purposes.—Construction of Revised Statutes, chapter 32.

M. SOW & Co. carried on business in the City of Halifax, and also at Bedford in the County of Halifax, owning and occupying property liable to assessment for school purposes in both places. The members of the firm resided in the city of Halifax. Previous to the assessment of 1882 the firm made an assignment for the general benefit of their creditors to plaintiff, who was carrying on business at Bedford under the firm name at the time of the assessment, but also resided in Halifax. A portion of the property at Bedford assigned to plaintiff having been levied upon for rates claimed to be due for the support of schools in that section;

Held, WEATHERBE, J. dissenting, That after the assignment, under Revised Statutes, (4th Series,) chapter 32, sections 54 and 64, the property levied upon was only liable to assessment in the section in which the original owners last resided.

This case came before the court on the following case stated :—

William C. Moir, and James W. Moir, trading at Halifax and Bedford, under the firm of Moir, Son & Co., were, previous to 1882, the owners of mills and real estate situated at Bedford in School Section No. 37, in which they carried on business, and in respect of which they have for several years past been assessed, and paid rates for the support of schools within the School Section or District in which the mills are situated, and their employees reside,—under the provisions of Chapter 32, Revised Statutes.

Before the annual assessment of the school rates for 1882, the said firm of Moir, Son & Co. became insolvent, and, on the fourteenth day of September, A.D., 1881, they assigned their assets, including the mills and property at Bedford, to the plaintiff, by indenture, a copy of which is annexed.

After the assignment the plaintiff continued, under the terms thereof, to carry on the business at the mills at Bedford under the name of Moir, Son & Co., and was so carrying on business at the time of the assessment hereinafter mentioned.

William C. Moir, James W. Moir, and the plaintiff, were, at the time the assignment was made, resident in the City of Halifax, and they have been residents in the said city ever since.

In 1882, after the assignment, the mills and property in said school section, No. 37, were assessed for the erection and support of schools within the section in the name of Moir, Son & Co., as had been done in previous years, which assessment amounted to \$105.57.

The plaintiff refused to pay said rates on the ground that said property was not liable for school rates within that section, but should have been assessed for school rates in the City of Halifax, where he and William C. Moir, and James W. Moir resided.

A warrant was issued for the collection of said rates, pursuant to the law, and delivered to the defendant, chief constable for the County of Halifax, for execution, who, by virtue thereof, levied upon certain personal property of the

firm of Moir, Son & Co., in payment of said sum, with ten per cent, and expenses, amounting in the whole to \$118.62.

The plaintiff, who was carrying on the business of said firm under said assignment, replevied said goods under the writ issued in this cause.

If the court should be of opinion, that, under the facts above stated, the mills and property at Bedford, hereinbefore mentioned, are liable to be rated and assessed for the support of schools in School Section 37, in which the same are situated, judgment is to be entered for the defendant for \$118.62, with costs, otherwise judgment to be entered for the plaintiff for his costs.

Graham, Q. C., for plaintiff, cited *Revised Statutes*, chap. 32, sec. 54. This clause says the tax shall be levied on the residents of the section alone and other clauses must be controlled by it. Section 64 relates to property held by trustees; cites secs. 67, 68, 69 and 88. (WEATHERBE, J.—Sec. 54 only provides for individuals. It does not relate to corporations. It refers to cases where an individual owns property in different places, but not where two individuals own property in the same place.) Sec. 64 provides for this case. I am dealing with the case of a trustee. The fact that the trustee adopts a firm name does not constitute him such under the 68th section. He is a trustee within the meaning of sec. 64. There is nothing in the Act to enable the tax to be levied by warrant on a non-resident of the section. Sec. 54 provides on whom the assessment is to be levied. The parties are assessable here, and the rate is collected here, and the most section 69 says is that the section where the property lies shall get the benefit of it.

Ritchie, Q. C.—The policy of the Act is clear that property of corporations, firms, and individuals is to be assessed where they do business, and the property of individuals where they reside; secs. 67, 68 and 69. The assignment should make no difference. The rates are collected the same as they were before; sec. 64. Under the terms of the assignment the concern is in effect a company. The Act requires the property to be assessed in the name of the firm. (RIGBY, J.—Is not Graham literally a trustee? He is acting for the benefit of

creditors.) He may be. If Moir resided at Bedford and assigned to Graham at Halifax, the property would still be assessed at Bedford and not at Halifax. The property must be taxed in this way if at all.

THOMPSON, J., (March 31st, 1884,) delivered judgment as follows:—

The firm of Moir, Son & Co. lived and carried on business in the City of Halifax, and carried on business also at Bedford. On their Bedford property they were assessed at Bedford for the sectional assessment for schools under sec. 69 of chap. 32 *Revised Statutes*, 4th series, which enacts that the assessment of the property of a firm "shall be in and for the benefit of the section wherein it lies"—being the reverse of the rule applied to property held by individuals not in co-partnership, whether held by them in severalty or as joint owners, which would be assessed in and for the benefit of the section in which the owner or owners resided; see sec. 54. Before the assessment in 1882 the firm made a general assignment in trust for the benefit of creditors to the plaintiff. The firm was, of course, thereby dissolved, and the assessment could no longer be made as on a firm's property, under section 69, (although it was attempted to be so made,) and must have been made, under sec. 54, in the section in which the persons who had formerly constituted the firm resided, unless any provision to the contrary is contained in any other part of the statute. So far from there being any provision to the contrary sec. 64 expressly commanded that that course should be followed, for it said: "Property held by * * * trustees or assignees * * * shall be liable to be assessed * * * in the section in which the original owners of such property resides or last resided." That section, in this case, was not Bedford, but Halifax, which was made a school section by sec. 84, and in Halifax only could the assessment be made, in my opinion, unless we are to disregard sec. 64. At the argument there seemed to me to be reasonableness in *Mr. Ritchie's* contention that the assessment might be made in Bedford because the assignee was still carrying on the old business, (in execution of the trusts expressed in the assign-

ment) under the firm name; but while this might have misled the trustees, I do not think it altered the rights of the parties. Though using a firm name, as the assignment authorized him to do, the plaintiff was not a firm but an individual,—assignee and trustee. The other contention,—the one which has been accepted by my brother WEATHERBE, I am quite unable to coincide in. I mean the contention that the assignment should make no difference, and that the property should continue to be assessed as if owned by Moir, Son & Co. as a firm. The reasons why I think there must be a difference are: 1st. That the property by that assignment became “held by an assignee or trustee,” and the statute by express words enacts that all such property “shall be liable to be assessed in the section in which the original owner resides.” 2nd. That if, in view of that provision, we are to pass by the assignee and treat the property as if it were still in the hands of the original owners, Bedford would have no right to the assessment because we find behind the assignee, not a firm but two joint owners or tenants in common, William C. Moir and James W Moir. They are to be viewed as tenants in common and not as a firm because the firm had been dissolved by the mere act of making the assignment, and the business had ceased, and, as to tenants in common, it is quite clear that the assessment must be in the section where they reside. The fact that the legislature has only made an exception as to firms, (and some other bodies which need not be referred to,) and has not allowed tenants in common to be assessed where the property lay seems to me to be a conclusive answer to the only reason which has been suggested for ignoring the assignment and the enactment as to assignees or trustees. That reason is that an inconvenience might arise if it should be found that one of the original members of a firm lived in one section and another in another section. I am not prepared to say that any practical inconvenience in that case would exist,—the statute I think might be held to meet such a case by a construction which appears to me reasonable, but which I do not propose to state until the case comes before us,—but if the statute has not met such a case the court cannot alter the

statute to meet it any more than it can alter the statute to meet the case of tenants in common, in respect of whom just the same argument from inconvenience might be urged. The legislature has said to school trustees: "Assess property held by a trustee or assignee in the section where the late owner resides," and I cannot find it in my power to say to them; "Do not assess property held by a trustee or assignee in the section where the late owner resides lest perchance some day you find an assignee or trustee who represents owners living in more than one section."

I think, therefore, that judgment should be for the plaintiff.

MCDONALD, C. J.—I have most reluctantly arrived at the conclusion that, on the case submitted to us, there must be judgment for the plaintiff. Section 64 of the act provides, in express terms, that "property held by * * * trustees or assignees at the time of making the county assessment roll for any year, shall be liable to be assessed * * * in the section in which the original owner of such property resides, or last resided." Section 68 provides, in the case of any association, company, or firm "that the assessors, in assessing such property, shall have regard to the boundaries of school sections, and in every case return with their valuation of such property the name or designation of the school section in which it lies," and section 69 directs "that the assessment of such property shall be in and for the benefit of the section wherein it lies, and shall extend and apply to all rateable property held by any association, company, or firm, whether incorporated or otherwise; that is to say, the assessment payable directly by the association, company, or firm, in respect of any property, shall be paid in and for the benefit of the section where the property lies." While Moir & Co. did business as a firm, the latter section was applicable to them, and secured their assessment upon their large property at Bedford to section 37. But before the assessment for the year 1882 was made, Moir & Co. had assigned all their property, real and personal, to the plaintiff, Graham. They had ceased to be a firm. They became private individuals residing

in Halifax. They had ceased to be the owners of any real or personal property in section 37 liable to assessment. They were and are the original owners of that property resident in Halifax, and thereby become, clearly, parties contemplated in section 64, when regulating the assessment of property in the hands of trustees or assignees. It is quite clear, I think, that the legislature did not, while passing the act, contemplate the case of an assignment by a corporation or firm. Had such a consideration been present to the legislative mind, we must suppose that such reasonable provision would have been made as would reserve to the section some protection consistent with the general intent and scope of the law. But I cannot say that there is anything in the act which would justify me in ignoring the express provisions of section 64, on the assumption that the legislature intended to make some further and other provision by section 69, which is not indicated in that section or any other part of the statute. If, immediately after the assignment to him, Graham, the plaintiff, had sold the real estate and mills at Bedford to a private person or persons, resident in Halifax, clearly under the law, the property would be assessed for the benefit of the Halifax school fund. And it may have been the intention of the legislature, in the event of such an assignment as this, to consider the property to have been reinvested in private hands, instead of being in possession of the corporate or *quasi* corporate bodies referred to in section 69. If such was the intention, and it is not unreasonable to suppose so, then it would be a direct violation of the act, if we constructively supplied to section 69 such a provision as would give them relief in the case under consideration. I think judgment must be entered for the plaintiff.

RIGBY, J., concurred.

WEATHERBE, J.—In this case submitted to us under the statute, for our opinion, we are required to construe the language of several of the clauses of chap. 32 of the *Revised Statutes* "Of Public Instruction." Section 54 provides for assessment generally on residents of a school section who have real or personal estate within the county, and sets forth the

môde of collection. The assessment levied in the case now to be considered does not come within the provision of the language in this clause. The question for us is whether it comes within any other section of the act, or whether there is any provision to be gathered from reading the act under which the assessment made in this case can be sustained. The argument is that the present assessment is in direct violation of these words of section 64: "Property held by

* * * assignees at the time of the making of the county assessment roll for any year shall be liable to be assessed on all the assessments levied according to such roll, in the section in which the original owner of such properties resides or last resided." This seems to be in harmony with section 54, imposing the tax in favor of the section where the owner resides. Sections 68 and 69, however, we are urged to construe as sustaining the assesment made in the case. Section 68 provides for assessing property of any "association, company or firm," in the name of the concern, and not of the agent or single member, and distinguishes as to the value of such property where it lies in more than one section. And section 69 says that "the assessment of such property shall be in and for the benefit of the section wherein it lies, and shall extend and apply to all rateable property held by any association, company or firm, whether incorporated or otherwise, that is to say, the assessment payable directly by the association, company or firm, in respect of any property, shall be paid in and for the benefit of the section where the property lies." Now this language was directly applicable to the property in question, previous to the assignment, and what we have to determine is whether, by the assignment, it was intended, under section 64, to take it out of the class of cases where the assessment was to follow the property and put it into that class where it was to follow the owner; or whether the legislature has made no provision for taking the property of a firm who have assigned that property. The rules of construction require us to avoid the latter supposition if any other construction is reasonable. There is no reason why, under an assignment such as the present, by a firm,—if indeed in any case of assignment,—property should be relieved

from assessment. If we are to hold that the assignment mentioned in section 64 is to apply to partnership property assigned, then a difficulty would arise as to the residence of a firm, where the members did not reside in the same section, or of a corporation, where the language is wholly inapplicable; and I am of opinion that in reading sections 64, 68 and 69 together, it could not have been intended, in section 64, to include such an assignee as the plaintiff. The question remains whether, by a proper construction of the act, we can understand that the property of a corporation or partnership firm was intended, in all cases where transferred to an assignee, to be exempt from taxation, or whether, in other words, reading the assignment in question—and it is not necessary to decide as to every case of assignment—this property may not, without over-straining the act, be held to be property belonging a firm within the meaning of the act. And I am of opinion that such property was not intended, upon assignment, to be exempt, and that it may fairly be still included within the property mentioned in sections 68 and 69, until such disposal of it takes place as to bring it within some other provision of the act, or, at any rate, until some change of ownership occurs; and, I think, under the facts of this case, the property mentioned was liable to be rated and assessed for the support of schools in section 37, in which the same is situated, and that our judgment should be for the defendant for one hundred and eighteen dollars and sixty-two cents, with costs.

THE QUEEN v. HUGHES.

Before McDONALD, C. J., and WEATHERSE, RIGBY, and THOMPSON, J. J.

(Decided March 51st, 1884.)

Quashing conviction.—Jurisdiction of Stipendiary Magistrate.

THE defendant was brought before the Stipendiary Magistrate for the County of Halifax, and tried and committed for an assault on the high seas. The trial and conviction took place at the office of the Stipendiary Magistrate in the City of Halifax, which was outside the limits of the County.

Held, that the conviction, having been made outside the territorial limits of the magistrate's jurisdiction, was bad.

Quære whether if made at the dwelling house of the magistrate, though outside the limits of his jurisdiction, the conviction might have been covered by the Imperial Act, 9 Geo. I., cap. 7.

The defendant was brought before the Stipendiary Magistrate for the County of Halifax charged with the commission of an assault upon the second mate of the British barque *Jane Sprott*, of which defendant was master, while on the high seas. The defendant having been convicted of the offence charged, the proceedings were removed to the Supreme Court by writ of *certiorari*, and a rule was taken to set aside the conviction on the following among other grounds:—

Because the said Stipendiary Magistrate, was appointed as such for the County of Halifax, but not including the City of Halifax, and, as such magistrate, took the information, issued his warrant, and caused the said defendant to be arrested, tried and convicted within the said City of Halifax and its limits.

Because the said Stipendiary Magistrate tried and convicted the said defendant at the County Court House, within the limits of the City of Halifax, and out of his jurisdiction as such Stipendiary Magistrate.

McCoy, Q. C., in support of rule.—The magistrate was not legally appointed. On petition of at least fifty of the ratepayers of a district, the Sessions may set it off as a police district, and the Justices of the Peace of the district may then meet and appoint one of their number to be Stipendiary Magistrate; *Revised Statutes*, (4th Series) Appendix, chap., 129. This was not done. (McDONALD, C. J.—We had better assume that the county was originally laid off as a district.) Assuming that the Stipendiary Magistrate must be appointed by the warden and three councillors, the present stipendiary was only appointed by the warden and two councillors besides himself; *Acts of 1880*, chap., 1 sec., 18. Section 21 enables the council at any meeting to appoint one or more stipendiary magistrates under the provisions of chapter 129 of Revised Statutes, 3rd series. The Stipendiary Magistrate is not an officer of the municipality within the meaning of section 18, chapter 1, Acts of 1883. The act applies to officers like the clerk and treasurer. The Stipendiary Magistrate must be appointed at a full meeting of the council. *Dillon on Corporations*, sec. 33, shows the distinction between municipal officers and officers that are not such. (WEATHERBE, J.—It amounts to this that the officer can-

not appoint himself.) Yes, but the reason is that he must be in the position to exercise an impartial judgment. The jurisdiction of the Stipendiary Magistrate is limited to the municipality, which includes all parts of the county outside of the City of Halifax. The conviction is bad as being for different offences; *Steven on Indictments*, 221. The conviction is not in accordance with the information. As to jurisdiction cites *14 U. C., 2 B., 254*; *11 U. C. C. B., 307*.

Motton, Q. C., contra.—The County Magistrate had jurisdiction which is not taken away by the fact that there is a local Stipendiary Magistrate; *8 & 9 Vict., chap. 87., sec. 95*; *24 & 25 Vict., chap. 96, sec. 115*; *3 T. R., 279*; *4 T. R., 456*; *Abbott on Shipping, 748*, citing *Merchant Shipping Act*. There is no evidence that Mr. Griffin voted for himself. It was only necessary that three councillors and the warden should be present to form a quorum; *Lord Raymond's Reports, 1232*. The question as to whether the appointment was regularly made is not brought before the court. Mr. Griffin may have voted against himself, but, whether or not, his nomination as Stipendiary Magistrate did not disqualify him from acting as a councillor.

RIGBY, J., (March 31st, 1884,) delivered judgment as follows:—

Hughes, the defendant, was convicted before the Stipendiary Magistrate for the County of Halifax, for assaulting Lewin the second mate of the British barque *Jane Sprott*, of which the former was master, on board of that barque and upon the high seas; and the proceedings having been brought into this court by *certiorari*, we are asked to quash the conviction, for want of jurisdiction in the justice, upon several grounds. The affidavits show, and they are not contradicted, that Mr. Griffin, the Stipendiary Magistrate, who made this conviction, was appointed in August, 1882, to succeed William Evans, then deceased, who had been stipendiary magistrate for the County of Halifax, but not including the City of Halifax. It is also shown that the defendant, having been arrested under a warrant issued by Mr. Griffin, was brought before him and tried and convicted at his office within the

City of Halifax. It is abundantly clear from the authorities that a Justice of the Peace cannot exercise his judicial functions outside the limits of his territorial jurisdiction. The cases on the point are collected in the 5th edition of *Paley on Convictions*, where, at p. 17, the author thus states the law relating to the authority of magistrates, which, he says, "is confined to their respective districts; it is in no case attached to the person, so as to be capable of being exercised elsewhere than within those limits. It is laid down by *Dalton* that a Justice of the Peace for the time that he shall make his abode, or be out of the county where he is in commission, cannot intermeddle, or take any recognizance, or any examination, or otherwise exercise his authority in any matter that shall happen within the county where he is in commission 'for, being out of the county, where he is in commission, he is but as a private man.'" In consequence of the inconvenience of this law in cases like the present, the third section of the *Imperial Act*, chap. 7, 9 Geo. I., was passed, enacting that "if any such Justice of the Peace shall happen to dwell in any city or other precinct that is a county of itself, situate in the county at large for which he shall be appointed a Justice, although not within the same county, it shall be lawful for any such Justice to grant warrants, take examinations, and make orders, for any matters which one or more Justices of the Peace may act in, at his own dwelling-house, although such dwelling-house be out of the county where he is authorized to act as a Justice, and in some city or other precinct adjoining, that is a county of itself." And if, in the case before us, it had appeared that Mr. Griffin, though outside of the territorial limits of his jurisdiction, had yet made this conviction at his dwelling-house in the City of Halifax, it might perhaps be open to counsel to contend that the Imperial statute covered the case.

Upon the facts before us, however, I have no doubt but that this conviction was made without jurisdiction and must be quashed with costs.

WEATHERBE, J., said that, considering the effect of the decision, he concurred with the greatest reluctance.

JONES v. LOCKE.

Before McDONALD, SMITH, RIGBT, and THOMPSON, J J.

(Decided March 31st, 1886.)

Setting aside verdict.—New trial.—Evidence.

PLAINTIFF shipped for a fishing voyage on what is known as the "half clear lay," under which the master or owner fits out the vessel, the crew supply a portion of the provisions, pay the cook, &c., and the proceeds are divided in certain proportions. After the voyage had been partly prosecuted, and before it was completed, plaintiff was dismissed. In an action to recover the amount of plaintiff's share, there was evidence by the captain and by entries in defendant's books, of admissions of an amount due plaintiff, though it was contended that there had been no settlement. Judgment having been given for the defendant, an appeal was allowed and the cause ordered to be re-tried, as it might appear that plaintiff was entitled to something further than the amount admitted as due him.

Collie v. Bell, distinguished.

This was an appeal from a decision of DESBRISAY, County Court Judge. A vessel of which defendant was registered owner, was fitted out for a fishing voyage on what is known as the "half clear lay," under which the master or owner fits out the vessel, and the crew supply a portion of the provisions, pay the cook, &c., the proceeds of the voyage being divided among the captain, owner and crew in certain proportions. Plaintiff was shipped on board the vessel under the Merchants' Shipping Act, for the voyage. Before the voyage was completed the vessel put into Lockeport, where plaintiff was dismissed, after which the vessel proceeded again to sea and finished her voyage about the time for which plaintiff was originally shipped. The action was against the registered owner for wrongful dismissal and also on the common counts, to recover plaintiff's share of the proceeds of the voyage. The judgment was for defendant, from which plaintiff appealed.

Borden, in support of appeal, after referring to the evidence, was stopped.

Pelton, Q. C., and *Meagher, Q. C.*, contra.—At the time of action brought there was no settlement whatever. The case is one of partnership, and is in all essential points the same as *Collie v. Bell*, decided last year. It was there held that the plaintiff could not recover until after a settlement. (THOMPSON, J.—The action there was for money had and received, and there was no money had and received. This was a hiring.) There was no evidence of an account. (McDONALD, C. J.—

There is a statement on the books of the amount coming to the sharesmen.) The contract is made particularly in reference to the custom at Lockeport, which would be binding. The owner is not liable for the act of the captain in dismissing the plaintiff, whether rightfully or wrongfully. During the voyage, under the custom, the captain was in the place of owner. The vessel is let to the master for a period of time. (RIGBY, J.—If you could show that she was taken entirely out of the owner's control there might be something in your contention, but it is not so at all. What is the meaning of managing owner? That is part of the contract.) The vessel is practically let to everyone on board. That is the fair inference. There were two men on board, the cook and the seine master, who were hired by the crew and the master, and with whom the owner has nothing whatever to do. This is evidence that the vessel was hired to the captain and crew. The master has nothing to do with directing where the vessel is to sail, or what voyage she shall go on. The evidence in reference to the entry shows nothing more than that the captain came into the owner's office and told him how much fish was sold in Boston, and how much was realized. (SMITH, J.—The evidence is that the owner settles the voyage.) The charterer of a vessel is owner for the time being; *2 Camp.*, 517; *1 A. & E.*, 312; *6 Pick.*, 385; *12 Pick.*, 425; *16 Mass.*, 336; *5 Pick.*, 422; *7 Bing.*, 190. The letter written to the owner by the captain was voluntary and cannot bind the owner. (RIGBY, J.—Not of itself, but the owner got the cargo.) Supposing the captain discharged the plaintiff, the defendant is not in any way connected with it. The plaintiff should have gone to the owner. (RIGBY, J.—If the plaintiff was wrongly discharged he can recover on a *quantum meruit*. He has, in that case, no interest in the share.) As to the responsibility of the owner for the wrongful act of the master, *L. R.*, *1 Q. B.*, 162. (RIGBY, J.—One of the latest cases holds that the owners are liable to a person who, going on board a ship, stumbles over something and falls into the hold; *Hebbs v. Ross*, *L. R.*, *1 Q. B.*, 534.) There is a question here as to what was a voyage. There is evidence that when the vessel returned to Lockeport it was a voyage. (RIGBY, J.—There is

not much use in contending for that.) Some of the witnesses speak of the times the vessel returned as trips, but the weight of evidence is that the voyage was at an end when the vessel returned to Lockeport. (RIGBY, J.—Then the plaintiff would be entitled to what he had earned up to that time.) Yes, provided there was a settlement. Other witnesses speak of the first and second voyages. The vessel refitted and sailed on a second voyage. There is no evidence to support a *quantum meruit*.

Borden was not called upon in reply.

SMITH, J., (March 31st, 1884,) delivered judgment as follows:—

This is an appeal from the decision of the Judge of the County Court for District No. 2. The cause was tried at Shelburne, and judgment given for defendant. The suit was brought for James Jones by Jacob L. Jones, admitted by the Court to prosecute as his next friend, to recover from defendant a share of a fishing voyage, under an agreement not unusual with the owners of vessels on our shores,—such share of net profits to be paid in lieu of wages. We think the decision of the learned Judge below cannot be sustained. At least the plaintiff is entitled to the amount stated as due him by the captain and entered in the books of the defendant; but, as the evidence is not at all satisfactory with reference to the period when the voyage referred to in the ship's articles terminated, and upon which the sum the plaintiff would be entitled to depends, we are of opinion that the appeal must be allowed, and the cause remitted to the County Court for a new trial.

THOMPSON, J.—I agree that the judgment appealed from must be set aside, and that it will be more just to the plaintiff to send the cause to be re-tried than to give him judgment merely for the amount appearing in his favor by the account in evidence, when he may be entitled to something further. I would not add anything to what has been said, but for a misapprehension which seemed to exist at the time of the argument as to the ground of our decision in *Collis v. Bell*,

last term. In that case the action was not by the sharesmen, but by a creditor, who tried to invest himself with the rights of the sharesmen by levying an execution on the whole fish caught on the voyage, and proceeding to sell and to buy the supposed interest of the sharesmen in the fish. The right of the sharesman was, of course, only a right to a share of the proceeds, and that right remained in him, notwithstanding the attempt to divest him of it by going through the form of a sale.

McDONALD, C. J., concurred.

THE QUEEN v. LYONS.

Before McDONALD, SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided March 31st, 1884.)

Conviction under Canada Temperance Act.—Proclamation bringing Part 2 into force.

DEFENDANT was convicted under one of the penal provisions of Part II. of the Canada Temperance Act, 1878. The provision for bringing that part into force enacted that after a poll had been held in any county, the Governor-General-in-Council might declare that the second part should be in force and take effect in such county "upon, from and after the day on which the licenses for the sale of spirituous liquors, then in force in such county," should expire, and that upon, from and after that day the second part of the act should become and be in force and take effect in such county. In the County of Kings, where the offence had been committed, the poll had been held and the Governor-General in Council declared by proclamation that the second part of the act should be in force and take effect "upon, from and after the day on which the annual or semi-annual licenses now in force in said county will expire." There were then no licenses in the county, and there had been none for years previously,

Held, that the conviction must be quashed, as no day had been fixed, either by the statute or by proclamation, for bringing the second part of the act into force in Kings County.

The defendant was convicted before two Justices of the Peace for the County of Kings, of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act of 1878 and amending Acts, the second part of the said Act, then being in force in the said County, and was adjudged for said offence to forfeit and pay the sum of fifty dollars, to be paid and applied according to law, and also to pay the prosecutor ten dollars and ten cents for his costs, and if the several sums were not paid forthwith, that the same should be levied

by distress and sale of the goods and chattels of the said defendant, and in default of sufficient distress the defendant to be imprisoned in the common jail one month, unless the said several sums, and all costs and charges of the said distress and of the commitment and conveying of the said defendant to the said jail were sooner paid.

The proceedings having been removed to the Supreme Court by writ of *certiorari*, a rule *nisi* was obtained to quash the conviction on the following among other grounds :—

1. Because the second part of the Canada Temperance Act, 1878, was not in force in the County of Kings, when the alleged offence was committed.

Harrington, Q. C., Weeks and Roscoe, in support of rule.—There was no evidence before the magistrates of the publication of the Order-in-Council bringing the second part of the Canada Temperance Act into operation. The certificate from the clerk of the Privy Council is evidence of the making of the Order-in-Council. It is conceded by the information summons and conviction that the Act must be shown to be in force. Under section 99 no liquor can be sold after the Act is brought into force. The Act provides that it is to be brought into force by Order-in-Council published in the *Canada Gazette*. The publication is the essential fact. There is no other way in which the Act can be brought into force. The statute is a penal one and must be construed according to its letter and no further ; *14 Peters*, 476 ; *Holt*, 215 ; *4 Bing.*, 188 ; *1 H. L. C.*, 4. The fact of publication is a necessary one and must be proved before the magistrate can have jurisdiction. It must be proved that the order has been published in the *Gazette*. The Order-in-Council is of the same nature as a by-law, or anything on which the jurisdiction rests, which must be proved ; *32 U. C., Q. B.*, 332 ; *8 A. & E.*, 124 ; *Regina v. Bennett*, 1 Ont., 446 ; *4 Allen*, 74 ; *7 B. & C.*, 785. The court cannot take judicial notice of orders-in council or of their publication in the *Canada Gazette*. The Canadian Act of 1881, chapter 28, section 1, is similar to the English Documentary Act, 31 and 32, Vict. Provision is made for the proof of orders-in-council in either of two ways. If the

courts could notice them judicially the Act would have been unnecessary. Orders-in-Council are not judicially noticed in England; *Attorney General v. Theakstone*, 8 Price, 90, and the *Gazette* in which they are published was not judicially noticed until after the passage of the Documentary Evidence Act. These things must be brought before the courts before the courts will judicially notice them. In this respect they are different from the Acts of Parliament; *Dominion Acts of 1867*, chap. 1, sec. 38; *King v. Forsyth*, R. & R., 274; 4 P. & B., 542, 552. Questions as to the sufficiency of the evidence below can be raised on *certiorari*. (RIGBY, J.—In the *Colonial Bank of Australia v. Willan*, L. R., 5 P. C., 417, it was expressly held that the only purpose for which you could look at it was to see whether there was any evidence.)

Borden and Sedgewick, Q. C., contra.—Assuming that it was necessary to prove the publication of the Order-in-Council, there is nothing here to show that it was not so proved. The evidence not being in the conviction if there was no evidence before the magistrate it must be shown on affidavit; *Regina v. Bolton*, 1 Q. B., 66; 2 El. & Bl., 952; *Paley on Convictions*, 136, 410. The only exception is where the evidence is sent up as part of the conviction. As to the construction of Acts, see *Dominion Interpretation Act*, Acts of 1867, chap. 1, sec. 31. This is a reply to the cases cited on the other side which would have been good prior to the passage of the Act. It is enough to prove the passage of the Order-in-Council. Proof of publication is unnecessary. The words in reference to publication are merely directory and the Act comes into force within ninety days from the passage of the order, independently of the publication. The clear intention of the legislature was that the Act was to apply to the whole of Canada,—not only to counties in which licenses were in existence, but to counties in which it was illegal to issue them. It is necessary for the Court to give such a construction to the Act as will carry the intention of the legislature into effect. It is not the publication that brings the Act into force, but the order itself. The word “day” in section 96 means the day when the licenses expire in cases where there are licenses, and if there are no licenses the day

on which the order passes. (THOMPSON, J.—We must read it grammatically. It is a singular construction to make the word mean one thing in one case and an entirely different thing in another.)

Roscoe, in reply.—If the intention was that the Act should come into force in counties where there are no licenses, the Governor-in-Council can pass an order to that effect.

THOMPSON, J., (March 31st, 1884,) delivered judgment as follows :—

The defendant was convicted by Justices of the Peace for the County of Kings, on August 7th, 1882, of an offence which is stated in these words in the conviction :—"For that the said Joseph R. Lyons did within three months previous to the 30th day of December, 1881, being the date of the commencement of the prosecution on which this conviction is founded, that is to say, on the 24th day of October, 1881, at Kentville aforesaid, sell spirituous and intoxicating liquor, contrary to the provisions of the Canada Temperance Act, 1878, and Acts in amendment thereof, the second part of the said Act then being in force in the said County of Kings." This conviction was brought up to this Court by *certiorari* and an application was made to quash it on various grounds which were fully argued, but on only one of which we now find it necessary to give judgment. That ground is that neither at the time of the alleged offence nor at the time of the conviction was the Canada Temperance Act in force in Kings County. The Act, (chap. 16 of 1878,) is divided into three parts. The second part, under which this conviction was made, begins with this enactment which the defendant has been adjudged to have violated : "From the day on which this part of this Act comes into force and takes effect in any county * * no person, unless it be for" (certain exceptional uses which it is necessary to mention) "shall * * by himself, his clerk, servant or agent, expose or keep for sale or * * sell * * any spirituous or intoxicating liquor," &c.

It is our first duty then to see on what day the Act went into force and effect in Kings County. Part first relates to

the "Proceedings for bringing the second part of the Act into force." It provides that a petition to the Governor-General in Council asking for a poll to be held in the county shall be signed by at least one-fourth of the electors and sent to the Secretary of State. After this the poll is to be held on the day appointed, and, in case a majority of votes appear for the petition, (by sec. 96) "the Governor-General in Council may at any time after the expiration of sixty days from the day on which the same was adopted by Order-in-Council * * declare that the second part of the Act shall be in force and take effect in such county * * upon, from and after the day on which the * * licenses for the sale of spirituous liquors then in force in such county * * will expire, provided such day be not less than ninety days from the day of the date of such Order-in-Council; and, if it be less, then on the like day in the then following year; and upon, from, and after that day the second part of the Act shall become and be in force and take effect in such county." In King's County the petition was signed and forwarded, the polling day was appointed, the poll was held and the petition adopted by the electors. No licenses had existed for some years in the county. The date when the second part of the Act should be declared to be in force could not therefore be fixed, as Parliament seem to have anticipated that it could always be fixed, in relation to the date of expiry of such licenses. Yet the proclamation calling the prohibitory part of the Act into force, dated 17th June, 1881, was expressed thus :

"His Excellency has been pleased to declare and it is hereby declared that the second part of 'The Canada Temperance Act, 1878,' shall be in force and take effect in the said County of Kings, upon, from and after the day on which the annual or semi-annual licenses for the sale of spirituous liquors now in force in the said County will expire, provided such day be not less than ninety days from the day of the date hereof, and if it be less then on the like day in the following year."

Now with the most willing disposition to give to the statute and proclamation a liberal interpretation, I find it impossible to fix any day when the Act came into force in

King's County. Had any licenses been in force there, the date when the statute would take effect could have been ascertained by evidence showing when such licenses expired, but the case of a county not having such licenses has been left quite unprovided for,—has been left without any date from which to compute the time for bringing part II. into force. I need hardly say that if Parliament has not fixed the day, and the Governor in Council has not been able to fix the day, the court cannot do so, and that we cannot sustain, under such circumstances, a conviction by which the defendant was adjudged to have violated the Canada Temperance Act by selling liquor at the time when he is proved to have sold it. When he made the sale he may have been violating another law, but he was not charged with or tried for that. So far as this statute is concerned he could commit no offence, and the magistrates could acquire no jurisdiction in respect of any supposed offence until a time arrived when the statute made the sale in that county unlawful, and no such time had ever been designated either by Parliament or by the Governor in Council announcing the will of Parliament. I feel bound, therefore, to sustain the objection, as a similar objection was sustained, in such a case, by a recent decision of the Supreme Court of New Brunswick.

The rule *nisi* to quash the conviction must, in my judgment, be made absolute.

MCDONALD, SMITH, and RIGBY, J J., concurred.

WEATHERBE, J.—I think all the objections taken were technical. I concur in the judgment read, but I regret that the case must be decided on a technical ground though I think no other conclusion can be reached.

NOTE.—Judgment in *The Queen v. Lyons* was decisive of the following cases :—

The Queen v. Lyons.
do. v. Dodge.
do. v. R. McKenzie.
do. v. Foster.
do. v. Doran.
do. v. Dodge.
do. v. do.
do. v. Mahar.
do. v. C. McKenzie.
do. v. do.
do. v. Hill.
Nickerson v. Crowell.
Ford v. Patch.

Ford v. Barss.
do. v. McNutt.
The Queen v. Gibson.
do. v. Cox.
do. v. McWilliams.
do. v. Thomas.
do. v. Carter.
do. v. Fraser.
do. v. Mahon.
do. v. Edwards.
do. v. Murphy.
Hogg v. Ryan.

SEAMAN ET AL. v. WEST.

Before McDONALD, C. J., and McDONALD, SMITH, WEATHERBE, and RIGBY, J J.

(Decided March 31st, 1884.)

Policy on behalf of whom it may concern.—Ratification.

DEFENDANT resisted payment of a claim under a policy, on the ground that plaintiff's interest as mortgagee had been satisfied from the proceeds of a prior insurance. It appeared, however, that plaintiff had insured, not only to protect his mortgage, but on behalf of the owners, or if not so, there was ample evidence of ratification, and the Court therefore discharged the rule to set aside the verdict for plaintiffs.

This was an action on a policy of insurance "for whom it may concern," issued by the Ocean Marine Insurance Association, of which the defendant was a member, on the schooner *Edward Burton*. Plaintiffs' writ contained an allegation that plaintiffs and certain third parties, who were mentioned, or some or one of them, were interested in the subject of the insurance at the time the insurance was effected, and until and at the time of the loss. Defendant, in his pleas, denied the interest of plaintiffs and the third parties, as alleged, and pleaded, among other things, fraud, concealment of material facts, the existence of prior insurance covering the risk, and, for a thirteenth plea as follows:—

"That at the time of the subscribing of said policy by him, and his becoming such insurer as alleged, the plaintiffs and their agents wrongfully concealed from the defendant certain facts then known to the plaintiffs and their agents, and unknown to the defendant and material to be known to the defendant, and material to the risk of said policy, that is to say, that the interest in said schooner so to be insured, was the interest of a mortgagee or mortgagees, and that said vessel was subject to several mortgages, and that while said vessel had at one time been a British ship, she had since ceased to be a British ship, and was then a foreign vessel, owned by aliens and foreigners, and had been placed under the Haytien flag, and that the British Registry of said vessel had been returned and cancelled."

The cause was tried at Halifax, April 27th, 1883, before WEATHERBE, J., without a jury, who found a verdict in

plaintiffs' favor for \$25, with interest from date of judgment. A rule was taken to set the verdict aside and for a new trial.

Sedgewick, Q. C., and *Borden*, in support of rule.—There was concealment of one of two material facts by the assured at the time of effecting the insurance,—either of the fact that the vessel had no register or of the fact that the vessel was a Haytien vessel. Evidence was rejected of reasons why the risk would not have been accepted, if it had been known that the vessel was a Haytien vessel; *Arnould on Marine Insurance*, 5th ed., 579. Evidence was also rejected to show that the interest of the insured was a mortgage interest, and that the insurance would not have been granted if this had been known. A policy had been previously issued in another company covering the interest insured.

Meagher, Q. C., contra, was stopped on the points as to rejection of evidence and the national character of the vessel, and was called on as to the agent's authority to insure.—As to ratification of insurance cites *Arnould on Insurance*, 163, 164. Where a party effects insurance for another, express evidence of ratification is not necessary, but the ratification may be implied. Here there were circumstances proved from which the jury could infer ratification. No objection on the ground of want of authority on the part of Seaman to effect the insurance was taken at the trial. Nolan gave Seaman a power of attorney to insure for him. There is no direct proof of the execution of the power of attorney, but it should have been objected to some time during the trial. If the objection had been taken at the trial evidence could have been given at once to prove execution. The insurance was effected for whom it may concern, and the power of attorney produced at the insurance office showed that Amos Seaman, the ship's husband, had power to insure for one of the parties interested. This was evidence sufficient to support the verdict. The interest is proved, and the only question is as to the authority; *1 Parsons on Insurance*, 429. The policy put in by defendants does not support their plea.

Sedgewick, Q. C.—The evidence shows that calling upon the insurers for the interest of Nolan and McDonald, was

an after-thought. All that Seaman asked for was the mortgage interest. The fifth plea distinctly put it in issue that the insurance was made for McDonald and Nowlan. There was no ratification by McDonald, and no power of attorney by him put in.

MCDONALD, C. J., (March 31st, 1884,) delivered judgment as follows :—

Plaintiffs, on the 29th September, 1880, caused insurance to be effected with the defendants on the schooner *Edward Burton*, for one year, "on account of whom it may concern," for the sum of one thousand dollars. The following is the application on which the policy issued :—

SAINT JOHN, N. B., 29th Sept., 1880.

Insurance is wanted by A. Seaman & Co., on account of whom it may concern ; loss, if any, payable to them per schr. *Edward Burton*, master, McDonald, from 27th inst., for 12 months, to 27th September, 1881.

Register tonnage ; 141. Where built ; Parrsboro.

Class A., 1½ Rec. When built ; 1873, opd. 1879.

Present condition, good ; last advices.

Cargo ; general.

If sheathed, when, and of what material ?

Where is vessel ; at Boston 27th, ready for Hayti.

On vessel 64, \$1,005 ; ½, valued at \$7,000 ; rate, 14%.

A. SEAMAN, & Co.

J. F. TUFTS.

The vessel sailed from Boston about the date of insurance, and was lost on a voyage from that port to Missgoane, Hayti, on the 18th October, 1880. The vessel, at the time of insurance, was owned by Samuel McDonald, who was master of her when lost, and Lewis Nolan,—the former owning fifty-six, and the latter eight sixty-fourth shares. Nolan's share of the vessel was mortgaged to plaintiffs for \$2,600. When, after the loss, plaintiffs demanded the sum insured the defendants declined to pay, alleging that the plaintiffs had not such an interest in the vessel as would entitle them to recover in this action. It appeared that the plaintiffs had effected

other insurance in Boston on the same vessel to the amount of \$4,500, of which \$4,000 was paid them, or more than sufficient to pay their mortgage on the *Edward Burton*, and the defendants, treating this mortgage as the only insurable interest represented by the plaintiffs, contended that such interest having been discharged by the payment of the mortgage they, the defendants, were not liable on their policy. It appears from the evidence that the plaintiffs were ship's-husbands for the *Edward Burton*, and principally managed the ship's business, and that, for this purpose, they were furnished with adequate powers of attorney by the owners, including authority to insure in their interest. On this point I may as well say in passing that if this express authority were wanting the evidence of subsequent and prompt ratification by the owner, McDonald, is ample. The company were informed of his interest in the vessel by the affidavit of Amos Seaman, sent to the company as one of the documents required by them in proof of interest, and he subsequently was present with Mr. Seaman in the office of the defendants, when the latter demanded the amount of the policy, as his agent and, at the same time, directed the attention of the secretary to the fact that McDonald was present and prepared to give any additional information in his power. On this subject *Arnould* says:—"It is not, however, essential to prove prior authority, either express or implied; it will be sufficient to show that the principal, on becoming acquainted with what the party effecting the insurance has done, ratifies and adopts it, such subsequent ratification being equivalent to a prior authority." "As regards the evidence requisite to establish the fact of ratification, proof of an express ratification is not needful; the adoption of the policy may be inferred from the conduct of him for whose benefit it was originally intended. If he means to reject it he should express his dissent as soon as he is informed of the fact; if he fail in so doing his adoption of the contract will, generally speaking, be inferred from his silence." With regard to the time at which the adoption must be made it is clear that it need not be during the prevalence of the risk. In many of the cases there was no ratification till after the loss had taken place and was

known to the principal; and in one case, the only evidence of adoption was a letter written by the principal two years after the making of the insurance, and nearly as long after he had become aware of the loss, expressing a hope that the party who had effected the policy had procured a final settlement from the underwriters; *Arnould*, 150, 151, 152. The proof of ownership of McDonald and Nolan is equally clear. The following statement from the registry was put in without exception as representing the ownership at the date, 14th May, 1881, and the title previous to that date in part. (His Lordship here read a statement from which it appeared that on the last mentioned date Samuel McDonald was owner of fifty-six sixths in the ship *Edward Burton*, subject to several mortgages, including one to Seaman for \$2,500; that on the 21st June, 1877, a bill of sale was registered from Gabriel Miller to Samuel McDonald of sixteen shares in consideration of \$1,250; that on the same day a bill of sale was registered of thirty-two shares from Hannah Merriam to McDonald in consideration of \$2,500, and that on September 3rd, 1877, a bill of sale was registered from McDonald to Nolan of eight shares in consideration of \$625.)

We have then the affidavit of Amos Seaman, of which I read the following extract, this affidavit, be it remembered, being in the hands of the defendants before action brought:

"That at the time the loss hereinafter detailed occurred, the following persons were interested in the said vessel as owners or mortgagees, and their several interests, as aforesaid, were intended to be and were covered by the said Ocean Marine Insurance Association's Policy, viz:

Samuel McDonald, owner, 56/64 shares.

Lewis Nolan, " 8/64 "

A Seaman & Co., mortgagees, \$1,000; but that owing to the payment of the said sum of four thousand five hundred dollars additional insurance since the loss of said vessel, the said A. Seaman & Co., have been paid their said mortgage in full, and now render these proofs of loss and interest by the authority and on behalf of the other said parties and owners above mentioned, whose said interest still subsists."

All this evidence of ownership and interest is uncontradicted by the defendants, although at the interview with Seaman, and, indeed, throughout the negotiations for payment, refusal to pay was rested on this ground alone. The only other point requiring notice is the contention made by Mr. Sedgewick as to the national character of the vessel. Admitting the fact to be that the vessel had been transferred to the Haytien flag, I am unable to discover how that could affect the plaintiffs in this suit. There was no warranty of nationality, no misrepresentation, nor concealment, and the application for insurance informed the defendants that the vessel was bound for a Haytien port. In my opinion the learned Judge who tried the cause properly rejected the evidence marked as rejected by him in the examination of Salter and Belcher, and on grounds so obvious that I would not be justified in occupying my time in discussing them.

I think the rule to set aside the verdict should be discharged with costs.

CAMPBELL v. YEADON.

Before McDONALD, C. J., and McDONALD, RIGBY and THOMPSON, JJ.

(Decided March 31st, 1884.)

Plea in trover denying plaintiff's property.—When jus tertii can be set up under such plea.

In an action of trover for quartz, &c., defendant pleaded denying plaintiff's property in the goods, and gave evidence that the property had been seized under execution against the plaintiff and sold to a third party. The plaintiff at the time of the alleged conversion was out of possession.

Held, that as the plaintiff was out of possession, defendant could set up the *jus tertii* under a plea denying the plaintiff's property.

This was an action of trover for the wrongful taking and carrying away and conversion of a quartz crushing mill, with all things belonging thereto. Defendant pleaded, among other pleas, three pleas denying that the building, materials, and goods and chattels in the several counts of the plaintiff's declaration mentioned were the property of the plaintiff. At the trial of the cause before McDONALD, C. J., evidence was given on behalf of the defendant to show that he had bought

the crusher from one James King, and also to prove that the interest of the plaintiff in the crusher had been seized by the Sheriff of the County of Hants under executions issued on judgments recovered against the plaintiff by William Clements and James Allen, and sold at public auction to Otto S. Weeks. It also appeared that plaintiff was out of possession. Judgment having been given for defendant on the pleas referred to, a rule was obtained to set the same aside as against law and evidence, and on the grounds following:—

Because there was no plea of right in a third party and justification thereunder; because the papers in alleged suits against Campbell were improperly received, and also the bills of sale to Weeks and from Weeks were improperly received, and no possession was taken thereunder; because of improper reception of the testimony respecting judgment and sale thereunder; because there was no levy shown under a return to any execution against plaintiff.

Sedgewick, Q. C., shows cause.—We purchased the crusher in good faith from the person we supposed to be the rightful owner. The plaintiff cannot recover, he having neither the possession nor the right to possession at the time of the alleged conversion. If the plaintiff is not in possession he cannot recover even as against a wrong-doer, unless he is entitled to possession. Campbell does not pretend to say that he was in possession during seven or eight years. Where the plaintiff is out of possession we can set up a *jus tertii*. The property was sold by the sheriff under execution against the plaintiff. The execution showed a judgment and was binding until set aside; *Luke v. Loveday*, 4 M. & G., 980. If a party is wrongfully in possession of property for such a period of time that no action of replevin or detinue can be brought against him, and then transfers to a third party, the original owner has no right of action against the third party. I admit that I have no authority for this proposition. (McDONALD, J.—I should be surprised if you had. RIGBY, J.—It is an extraordinary proposition to ask us to accept without authority.) The Statute of Limitations says no action of replevin or detinue can be brought after six years. The statute begins to run from the time of the conversion, even though the

owner is unaware of it. If no action can be brought against Boggs, who had possession for six years, no action can be brought against the defendant who claims under him.

Wallace, in reply.—All the proceedings on the sale were irregular. The judgments are void, as there was a plea on the face of the record which was not got rid of.

(RIGBY, J.—There is no judgment proved. That is the most that can be said, that a judgment should be proved; regular or irregular.)

MCDONALD, J., (March 31st, 1884,) delivered judgment as follows:—

This is an action for trespass and trover, to which defendant, among other pleas, pleaded that the property was not that of the plaintiff, the truth of which plea was found by the learned Chief Justice, who tried the cause, in favor of the defendant. I had no difficulty about the correctness of the finding, and my only doubt was whether or not the pleas justified the reception of the evidence. It is quite clear that the plaintiff was not in possession at the time of the alleged wrong, and he, therefore, could not succeed in trover without showing good title. If he did show title, the defendant could show *jus tertii* under the plea denying it, and in rebuttal of his evidence; *Godsden v. Barrow*, 9 Ex., 415; *Luke v. Love-day*, 4 M. & G., 972. If the plaintiff was in actual possession, and then disturbed, the defendant would have to plead and justify under the authority of the rightful owner; *Geffreys v. G. W. Railway Co.*, 5 E. & B., 802; *White v. Mullet*, 6 Ex., 713. So in trespass to goods, the possession is evidence of the right of present property, and therefore sufficiently establishes the plea traversing the plaintiff's property in the goods against a wrong-doer, who does not show a better right or authority; *Elliot v. Kemp*, 7 M. & W., 312; *Carnaby v. Welsby*, 8 Ad. & El., 872. He cannot, in such case, set up *jus tertii* unless he can show authority to act under it. But where the plaintiff is not in actual possession at the time of the trespass, and therefore relies on evidence of mere legal title, the defendant may set up *jus tertii* under a plea like this, traversing the title, so as to rebut the plaintiff's evidence;

B. & L., 673, and authorities cited As the plaintiff here was not in possession, and not disturbed in his possession, the defendant was not called upon to plead or prove a justification under a third party, alleged to be the owner ; and the authorities further show that, under a plea like this, traversing property in the plaintiff, evidence of *jus tertii* can be received in rebuttal of any evidence showing title in the plaintiff. In this respect there is no distinction between trespass and trover, and I am of opinion that the rule *nisi* to set aside the verdict must be discharged with costs.

THE COLONIAL BANK v. THE EXCHANGE BANK.

Before McDONALD, SMITH, JAMES, and WEATHERBE, J J.

(Decided March 31st, 1884.)

ROGERS, of Yarmouth, having consigned fish to Antigua, instructed his agents to transmit proceeds by cable to the Bank of B. N. A., in Halifax. The agents, through their clerk, applied to plaintiff bank for a cable draft for \$3000 on New York, for which they gave their own check, and received an order in cypher to Maitland, Phelps & Co., in New York, to pay the amount to credit of Rogers to the Bank of B. N. A. The latter bank then, with the consent of Maitland, Phelps & Co., communicated with the defendant bank that their account "was credited with \$3000, payment by Maitland, Phelps & Co. advised from Colonial Bank of Antigua, account Rogers." The defendant bank at once charged the amount to the New York agency of the bank of B. N. A., and credited the amount to Rogers on account of overdue bills.

Held, that, although the money had come into the hands of the defendant bank owing to mistake of Roger's agent in not transmitting the money to the Bank of B. N. A. at Halifax, as instructed, the plaintiffs had no title to it, having been paid by Roger's agent for their draft, and not being liable to return the money.

This was an action on the common counts, brought by the Colonial Bank of Antigua against the Exchange Bank of Yarmouth, to recover a sum of money paid into the latter bank, under the following circumstances:—B. Rogers & Son, doing business at Yarmouth, N. S., consigned a cargo of merchandise to their agents, McDonald & Co., of Antigua, by a vessel called the *Pronto*, and, being indebted to the Bank of British North America, Halifax, telegraphed McDonald & Co. as follows:—"When *Pronto* arrives cable funds Bank British North America, Halifax." After the arrival of the vessel

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McDonald & Co. applied to the plaintiffs for a cable order for the proceeds of the cargo as follows :—

REQUISITION FOR DRAFT.

Colonial Bank, Antigua, May 6th, 1879.

Draft on New York :

In favor Bank B. N. America	Notes, \$
Rogers credit, Yarmouth.....	Specie,
Draft for \$3,000	Account, 3,060.00
	\$3,060.00

The amount of the draft, \$3,060.00, with \$33.88 for charges, having been paid to the plaintiffs by cheque of McDonald & Co., the plaintiffs cabled their agents at New York, Messrs. Maitland, Phelps & Co., as follows :—

Colonial Bank, Antigua, 6th May, 1879.

To Maitland, Phelps, New York :

Pay against receipts to the Bank of British North America, Rogers credit Yarmouth, \$3,000 ; advise them of the credit.

On the 8th of May a clerk from Maitland, Phelps & Co., called at the Bank of British North America, New York, and wished to leave \$3,000 to be credited to the Bank of British North America, Yarmouth, for account B. Rogers & Son. He was informed that as the Bank of British North America had no branch at Yarmouth, they could not comply with his request, but the agent suggested that they were correspondents of the Exchange Bank of Yarmouth, and could place the amount to their credit and advise them of it for B. Rogers & Son. The clerk returned to the office of Maitland, Phelps & Co. for further instructions, and the members of the firm, on consultation, having come to the conclusion that it was the intention of the Colonial Bank to pay the money to the Bank of British North America at Yarmouth, and whether it was an agency or branch, was of no moment, so long as the money reached there, returned the cheque to the Bank of British North America, taking their receipt for it as follows :

NEW YORK, May 8th, 1879.

Received from Messrs. Maitland, Phelps & Co., Agents Colonial Bank, Antigua, the sum of three thousand dollars for account of Exchange Bank of Yarmouth; credit of Rogers.

For Bank of B. N. America,

\$3000.

W. LAWSON, *Agent*.

On the same day the Exchange Bank was advised of the payment as follows:—

8 May, '79.

Cashier Exchange Bank of Yarmouth:

Dear Sir,—Your account is credited \$3000—payment by Maitland, Phelps & Co., advised from Colonial Bank, Antigua, account Rogers.

Yours truly,

D. A. McTAVISH, *Agent*.

At the time of the receipt of the funds by the Exchange Bank, the firm of Rogers & Son were in financial difficulties, and were indebted to the bank in a large amount, including a draft which had been returned dishonored. The money was placed to the credit of Rogers & Son, and they were advised of its receipt.

On the 14th May, Maitland, Phelps & Co., having been notified of the mistake in the payment of the money, communicated with the Bank of British North America at New York, who, on the same day, telegraphed the Exchange Bank, informing them that the advice of \$3000 for credit of B. Rogers & Son should have been to the Bank of British North America, Halifax, and requesting them to stop payment. To this the Exchange Bank replied, on the following day, that the amount had been used to revive a draft of B. Rogers & Son, lying under protest.

The cause was tried before SMITH, J., without a jury, September, 1881, when it was agreed that a verdict should pass for plaintiff, with leave to move the Court for a rule to set the verdict aside.

The rule was argued (December 20th, 1882,) before a Division Court composed of SMITH, JAMES, and WEATHERBE,

J J. Judgment was delivered (December 21st, 1882,) as follows :—

JAMES, J.—In this case money was sent from the West Indies intended to go to the Bank of British North America at Halifax, but, by mistake, it was sent to the Bank of British North America at New York. The Colonial Bank of Antigua telegraphed to their agents, Maitland, Phelps & Co. of New York, to pay the money to the Bank of British North America to the credit of Rogers & Co., Yarmouth. Maitland, Phelps & Co., finding that the bank had no branch or agency at Yarmouth, consented that the money should be sent to the Exchange Bank of Yarmouth. There is some evidence that the latter bank was an agency of the Bank of British North America, but the transmission of the money was a mistake. It should have gone to the Bank of British North America and remained there. The telegram from the Colonial Bank was as follows : “Pay against receipts without deduction to Bank of British North America, Rogers’ credit, Yarmouth, \$3000, advising it of the receipt of the credit.” Now this was from the Bank of Antigua, and was to Maitland, Phelps, & Co. Maitland, Phelps & Co., finding that there was no branch of the bank in Yarmouth, consented that the amount should be sent to the Exchange Bank of Yarmouth. It was sent to that bank by mistake. If it had been left in the bank at New York the Halifax branch could have drawn it. In consequence of the mistake it happened to fall into the hands of a bank which held an overdue obligation of Rogers & Co., and laid hands on it as a gods-end. They did not expect the amount and had no reason to suppose that it was coming to them ; they got the money, however, and resolved to hold it. On the same day they informed Rogers, who said there must be some mistake. He telegraphed Maitland, Phelps & Co., who, on the same day, wrote to the defendant as follows :—

The Cashier Exchange Bank, Yarmouth, N. S. :

Dear Sir,—At 1.30 P. M. to-day we telegraphed you, “my advice \$3000 for credit of B. Rogers & Son, 8th May, should have been to Bank of B. N. A., Halifax. Stop payment and telegraph to us that you have done so.”

This was a distinct intimation to the Exchange Bank that the \$3000 had gone to them by mistake, and that it ought not to have gone. It was a distinct intimation that the money was to have gone somewhere else. The reply of the Exchange Bank was: "\$3000 credit B. Rogers & Son used and cannot recall." This was a clear refusal on their part to repay the amount.

It was argued that the Exchange Bank knew nothing about the Colonial Bank or Maitland, Phelps & Co., but nothing could be more distinct than the letter from the Bank of British North America, and, with that notice, the Exchange Bank applied the amount to meet an overdue note. They intended to grab money which did not belong to them,—a most dishonest transaction. If they had returned the security which the amount was appropriated to meet, they would have altered their position, the only thing that could have protected them,—but they stopped short of this, merely making the entry in their books. They received the money to the use of the true owner, whoever it might be. It appears to me that the defendants had every notice they could require. They applied to the Bank of British North America to know what Maitland, Phelps & Co.'s instructions were, and received their answer. Did they act upon the answer? No. The action for money had and received is one in which you can recover money which, in conscience, a party cannot retain. It is therefore maintainable by some one against the defendant. By whom? By the owner of the money. Where money of the principal is paid by his agent under circumstances which make it recoverable the action can be maintained by either principal or agent. From the moment I read the telegrams I have had no difficulty. The circumstances are conflicting and unusual, but I think the difficulty is solved by reference to the telegrams, which show that defendants got the money and that there was a demand, notice and refusal.

SMITH, J.—I think there are difficulties in this case. It is one of an unusual character, and we have few authorities; but, looking at the whole circumstances, I think the plaintiffs are entitled to recover, and that the verdict in their favor must be sustained, though I am not without doubt.

WEATHRRBE, J.—I cannot say that I regret that the decision of the majority of Court is in favor of sustaining the verdict. However, there are difficulties which do not permit me to concur. The plaintiffs sue on the ground that they are out of pocket the amount of their claim, or that they are liable to some one for the amount which was paid in to the defendants. I consider that they are neither out of pocket nor liable. There is no evidence and the action cannot be maintained on either of these grounds. It appears to me that no mistake has been shown. What plaintiffs did was fully sanctioned by the agent of Rogers & Co. at Antigua, when the cable message was sent to New York. On these grounds I cannot see any mistake on which plaintiffs can recover, or any circumstances which would justify an action by them for the money paid in. I have another difficulty, though I admit that it is somewhat explained by the examination of the evidence. That is, that the defendants received the money with instructions to pay it to Rogers & Co. If a mistake was made by any one of the parties through whose hands the money passed, it appears to me that the defendants should have full information of the nature of the mistake, so as to be able to know to whom they were to pay the money. There is no doubt that they had information that there was a mistake, but not that there was a mistake on the part of the plaintiffs because it does not appear that there was such a mistake. There are other difficulties to which it is not necessary to refer.

A rule having been obtained to review the judgment of the Division Court, the cause was reargued January 9th, 1884.

Pelton, Q. C., and Meagher, Q. C., in support of rule.—The instructions were, on the arrival of the vessel, to remit by draft on the Bank of British North America at Halifax to the credit of Rogers of Yarmouth. In the requisition for the draft the word Halifax was omitted, and the draft was drawn on the Bank of British North America at New York. The mistake was not made by the Colonial Bank, by whom the draft was drawn, but by the agents of Rogers & Co., who made out the requisition. The plaintiffs can

recover nothing, because they paid the money precisely as they were instructed to do. The Bank of British North America, having no agency at Yarmouth, placed it to the credit of their correspondents, the Exchange Bank of Yarmouth. The Exchange Bank charged the amount to the Bank of British North America, New York, and credited Rogers with it. That was the end of the matter, so far as any dealing with the money was concerned. Our contention is that Rogers & Co., should have sued. (WEATHERBE, J.—In that case the defendants would have defeated them by pleading their set off.) Yes, and that is the secret of the action being brought in the name of the Colonial Bank. The Colonial Bank are not liable, in any way, to repay the money. The money was not received to their use, and action in that form will not lie.

Graham, Q. C., was called on contra.—It is clear that the Colonial Bank, through their agents in New York, paid this money to the Exchange Bank, Yarmouth, to the credit of Rogers & Co., instead of paying the money to the Bank of British North America to the credit of Rogers & Co. In this they mistook their instructions, and we are entitled to recover. A person came to the Bank of British North America in New York, from Maitland, Phelps & Co., the plaintiff's agents, and wished to leave \$3000 to be credited to the Bank of British North America, Yarmouth, to the credit of B. Rogers & Son. The Bank of British North America in New York then led them into the error by saying they had no agency at Yarmouth, but would credit it through their correspondents, the Exchange Bank of Yarmouth. The clerk from Maitland, Phelps & Co., went to consult that firm, and, on returning, said he presumed that would be satisfactory, and left the money, which was placed to the credit of the Exchange Bank, and the latter were advised of the fact. The Colonial Bank were, in effect, to pay the money to the Bank of British North America, Yarmouth. They made a mistake, and, having done so, have the right to bring the action. The mistake was made by the plaintiffs' agents in New York, in paying the money contrary to their instructions, by paying it to the Exchange Bank.

(WEATHERBE, J.—I do not see that the word, "Halifax," being left out of the requisition affects the case in the slightest degree; the question is whether there has been a mistake at all. The plaintiff has carried out his instructions, has he not?) No. The Exchange Bank were not the regularly authorized correspondents of the Bank of British North America, New York. The reason they were suggested was that they had an account with them. (MCDONALD, J.—The Bank of British North America got the money. The mistake was in the manner in which they undertook to convey it to Rogers & Co. Had the plaintiffs anything to do with that mistake? I do not think so.) The mistake was in the paying the money to the credit of the defendants. (MCDONALD, J.—The plaintiffs did not do that.) Their agents did. Cites *Bullen & Leake*, pp. 44, 45. As to the plaintiffs' right to recover under money had and received, where money is paid by mistake, see *Hudson v. Robinson*, 4 M. & S., 475; *Lucas v. Warwick*, 1 M. & R., 293; *Saunderson v. Gardner*, 14 U. C., C. P., 330. The defendants are liable in money had and received, even if there is no evidence that they actually received the money; *Wilkinson v. Clay*, 6 Taunt.; *Standish v. Ross*, 3 Exch., 527; *Gingill v. Perkins*, 4 Exch., 720; *Simpson v. Ingraham*, 2 B. & C., 74; *Mills v. Guardians of the Poor*, 3 Exch., 590; *Arnospons v. Mildred*, L. R., 9 Q. B. Div., 530.

Pelton Q. C., in reply.—There was no mistake by the Colonial Bank. The evidence shows that the mistake, if any, was by Maitland, Phelps & Co. There was no mistake on the part of Maitland, Phelps & Co., who paid the money at New York, with full knowledge that there was no branch of the Bank of British North America at Yarmouth. (WEATHERBE, J.—How did the defendants get the money?) From the Bank of British North America. (WEATHERBE, J.—They supposed the money was to go to Rogers, and found out where he lived and sent it, whereas it was to go to the Bank of British North America at Halifax. In the ordinary acceptance of the term, that would be a mistake.) I suppose so; but I contend that it was not such a mistake as would enable them to recover, inasmuch as they had a full knowledge of the facts. They had a full knowledge of the instructions and

of the fact that there was no branch of the bank at Yarmouth ; *Mowat v. Wright*, 19 Am. Decisions, 508. (WEATHERBE, J.—They supposed it to be a fact, which was not a fact, that the money was to be sent to Rogers' own hands. That may not be an error in law.) Maitland, Phelps & Co. exceeded their instructions. (WEATHERBE, J.—Is there any evidence to show that they knew the money was not to go to Rogers?) I don't know of any. In *Rogers v. Kelly*, 2 Camp., 123, money was paid by a banker's clerk which had been paid into the bank for a specific purpose. It was held that the person paying the money in could not maintain the action. The money received by the defendants was not the plaintiff's. Even if it was, in the absence of privity, they could not recover in this action; *Black v. Siddeway*, 15 L. J., Q. B., 359. On the point as to privity of contract, *Moore v. Bushell*; 27 L. J., N. S., Exch. 3; *Hill v. Royds*, L. R., 8 Eq., 290; *Cobb v. Beck*, 6 Q. B., 930. There is no evidence that the Colonial Bank ever sent any money to Maitland, Phelps & Co., or that the latter were their agents. If Maitland, Phelps & Co. paid money contrary to their instructions, they cannot recover from the Colonial Bank. The Colonial Bank did not send the money they received, but merely a telegram, which would have made them liable to Maitland, Phelps & Co., if the latter had paid the money in accordance with their instructions. The money is still in the hands of the plaintiffs, who, therefore, cannot recover. (WEATHERBE, J.—The jury found that Maitland, Phelps & Co. were the plaintiffs' agents, and that they paid out of receipts in their hands. If that is so, the mistake is clear, beyond all question.) If the money can be traced back through the Bank of British North America, and Maitland, Phelps & Co., why not go further? In that case you trace it into the hands of McDonald, and from him to Rogers & Co., whose money it was. (WEATHERBE, J.—Because the Colonial Bank is liable for not carrying out its instructions. JAMES, J.—Another reason is, that McDonald merely purchased a draft of the plaintiffs. WEATHERBE, J.—You cannot go beyond the person who made the mistake.) If there was no set-off Rogers & Co.

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could recover from the defendants, as they received the money and placed it to Rogers & Co.'s credit. Placing the money to the credit of Rogers & Co. established a privity at once. There should have been notice of the mistake and demand before action brought; *L. R.*, 4 *Exch.*, 189. There was no notice whatever here. (WEATHERBE, J.—They knew plaintiffs sent the money, and every circumstance about it. They took care to inform themselves.) The money came into the defendants' hands rightfully, and there must be a notice given them before action. (WEATHERBE, J.—I should have thought you would have referred to the class of cases where the question was, whether the information was sufficient.) *Robinson v. Palmer*, 2 *Allen*, N. B. Reps., 223. The only demand was made by the Bank of British North America. There is no evidence that plaintiffs ever knew anything of the demand or refusal. The notice was not in time. Defendants sustained prejudice. The money was placed to Rogers' credit, in payment of an overdue bill, and other parties to the bill discharged; 9 *B. & C.*, 902; *El. Bl. & El.*, 148; 15 *C. B.*, N. S., 324; 4 *B. & S.*, 14.

Graham, Q. C.—If Maitland, Phelps & Co., could sue, the plaintiffs can; 1 *El. Bl. & El.*, 795; 1 *C. M. & R.*, 410; 2 *Cowper*, 805; 1 *Camp.* 337; 12 *M. & W.*, 585.

WEATHERBE, J., (March 31st, 1884,) delivered judgment as follows :—

The transaction seems to be this. One Rogers, of Yarmouth, in this Province, having consigned a cargo of fish to Antigua, telegraphed to his agents, McDonald & Co. there, to transmit the proceeds by cable to the Bank of British North America here in Halifax. This is the message sent :—“Telegram Rogers to McDonald, Antigua. When *Pronto* arrives cable funds Bank British North America, Halifax.” McDonald & Co. thereupon instructed their clerk, England, to make an application to the plaintiff Bank in Antigua for a cable draft on New York for \$3000. This is the application written by England under authority from McDonald & Co. :—

“REQUISITION FOR DRAFT.

Colonial Bank,
Antigua, May 6th, 1879.

Draft on New York.

In favor Bank B. N. America.. Notes,	\$
Rogers Credit Yarmouth.....Specie,	
Draft for \$3,000.....Account,	3,060 00
	\$3,060 00

Received W. W. H., Cashier.

Paid in by A. England.”

With this application England paid into the plaintiff bank McDonald & Co.’s cheque for \$3093.88 and obtained an order in cypher from the plaintiff to Maitland Phelps & Co., of New York. This is the translation of the cypher put in evidence:—

“Telegram Colonial Bank to Maitland Phelps & Co. :

MAITLAND PHELPS & Co., New York.

Pay against receipts, without reduction, to Bank British North America, Rogers’ credit, Yarmouth, \$3000 advising them of the receipt of the credit.

W. H. JONES, Pro Manager.

W. W. HEATH, Accountant.”

Upon the receipt of this message Maitland Phelps & Co., in New York, sent a cheque drawn by that firm to the order of the Bank of British North America, to the agent of that bank in New York, with a receipt in the following form to be signed by that agent :—

“New York, May 8th, 1879.

Received from Messrs. Maitland Phelps & Co., agents Colonial Bank of Antigua, the sum of \$3000 for account of Yarmouth Bank, credit of Rogers.”

The agent Lawson, after looking at the cheque and receipt said, “We have no branch in Yarmouth, but we have an agent there and could make the amount available to Rogers there,” and Lawson declined to give a receipt in that form. The messenger, after returning with the check to Maitland Phelps & Co., with a form of receipt as amended by Lawson of which they approved, was sent back and the amount was paid in,

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and the amended receipt in this form signed by Lawson retained :—

“ New York, May 8th, 1879.

Received from Messrs. Phelps & Co., agents Colonial Bank of Antigua, the sum of \$3000 for account of Exchange Bank of Yarmouth, credit of Rogers for Bank of British North America.

W. LAWSON, Agent.”

The sum of \$3000 was then placed by the agent of the Bank of British North America in the Bank in New York, to the credit of the defendant bank, and a communication was on that day sent to the defendant at Yarmouth from the agent of that bank as follows :—

“ 8 May, 79.

Cashier Exchange Bank of Yarmouth,

Dear Sir,—Your account is credited, \$3000 payment by Maitland Phelps & Co., advised from Colonial Bank, Antigua, account Rogers.

Yours truly,

D. A. MCTAVISH, Agent.”

The defendant bank charged the amount at once to the New York agency of the Bank of British North America and credited the amount to Rogers on overdue liabilities of his in the bank. The intention of Rogers in sending his message from Yarmouth to McDonald & Co. was to have this \$3000 sent from Antigua to the Bank of British North America here at Halifax. But for the mistake of his agents at Antigua doubtless the intentions of Rogers would have been carried out. That was the first mistake. Consequent upon and growing out of that mistake of McDonald & Co. who supposed the Bank of British North America in New York, where he intended the money to rest, would be advised to hold it, followed the mistake in New York of its going forward until it reached Yarmouth where Rogers did business and owed the defendant to whom the money was sent, after he had become insolvent. There does not seem to me to be authority in that message sent to Maitland Phelps & Co., (penned under mistake though it was,) to authorize the transmission of the amount to the defendant, and it must be admitted, I think, that upon the face of McTavish's letter of 8th May, upon

which payment was made to defendant, in which that bank is informed that the payment was made to the agency of the Bank of British North America by Maitland Phelps & Co., advised from the plaintiff bank, it would appear that (if the facts were not otherwise) this was a payment on account of plaintiff which would afford evidence to establish that one link in recovering it back in the plaintiff's name. There are, however, other questions which arise creating the difficulty in this case. Was there in point of fact a payment by plaintiff to defendant in Yarmouth made by plaintiff in mistake as is contended? It may be that there is nothing in what took place in New York and between the agent of the Bank of British North America there and the defendant, to deprive the transaction of that character, assuming Maitland Phelps & Co. to be acting as agent only of plaintiff. But from what took place in the Island of Antigua is it not clear that this money was not sent at all by the plaintiff. The order signed by plaintiff and sent to Maitland Phelps & Co. was in the nature of a draft. It was so regarded and intended by the parties at Antigua. It seems to me it was nothing more or less than the case of McDonald & Co. purchasing a draft from the plaintiff. At any rate McDonald & Co. were satisfied with the cable message prepared upon this application, and in accordance with that application, by plaintiff, and the mistake was the mistake of McDonald & Co., Rogers' agent. McDonald in his evidence says, "to save expense I omitted the word "Halifax," thinking it of no consequence; so long as the Bank of British North America received the money it mattered little which of their branches or agencies it was paid to. Plaintiff was not aware of the message from Rogers on which McDonald was acting. It seems to me the only mistake made in Antigua was that made by McDonald. And then again how can these plaintiffs recover? They can hardly be said, in the face of all that took place in Antigua, to have ever sent the money to defendants and are not out of pocket. For the cable draft or order which they wrote for transmission to New York they were paid at the time. They did not curtail the language of the message to save expense. The evidence of Heath, the manager of the plaintiff bank, is

clear on this point. He says, "The sum of \$3093.88 was paid to the plaintiffs at the Colonial Bank, Antigua, by a check of the said firm of McDonald & Co. out of the moneys to their credit on current account at Colonial Bank in Antigua." Plaintiffs are not liable to return that money to McDonald & Co., and if they were to procure a judgment of this court and obtain the money, they would, it appears to me, be receiving that which does not belong to them, and to which they have no right. Therefore, although the defendants have received this money through a mistake, and though it may be against conscience and against justice that they should retain it,—if indeed they are to be allowed to retain it,—I am of opinion that the plaintiffs are not the parties entitled to recover, and that the rule should be made absolute.

MCDONALD, J., concurred.

SMITH, J., said that he had reconsidered the matter since the former decision was given, and as he was now doubtful as to the plaintiff's right to recover he must concur in the judgment just delivered.

JAMES, J.—The money when it came to defendants' hands was money in course of transmission from plaintiff to bank of British North America at Yarmouth. The various parties through whose hands it came were all of them agents or sub-agents of the principal, and in the hands of them all it had the character of money in course of transmission, and it could not be deprived of that character until it came to its destination, by any mistake of the parties handling it. The defendant, into whose hands it came by an accident, endeavours to alter the character of the money in this respect by setting up *jus tertii*—the right of Rogers as owner of the money. The money was not sent to Rogers, but to the Bank of British North America to the credit of Rogers. It is to be fairly presumed that there was some reason for sending it to the Bank of British North America instead of direct to Rogers. The money was due to Rogers by the party who sent it. Why not send it direct to him? The fair inference and presumption is that the money was sent by Rogers, (through his agent,) to

the Bank of British North America because he owed them or had promised them the money, and it was, as the telegram states, to be paid to them to Rogers' credit. We do not draw from the evidence what was the state of accounts between Rogers and that bank, but we have it in evidence that Rogers paid the money through his agent to the plaintiff as a payment to the bank of British North America. It was accepted by the plaintiff as such and immediately paid by them to the Bank of British North America by means of the telegraph. But their agents made a mistake and the money found its way into the hands of defendants. They appropriate it as Rogers' money, setting up a right of a third person as an excuse. They do not prove that the money was that of Rogers. This they might have done and this I think they were bound to do. The plaintiffs had no interest of their own in this matter, and they undertook to transmit the money, they were paid for their trouble and risk, and were liable to the owner of the money for its safe transmission. They want it back that they may send it to the true owner. Suppose the defendants had picked up an envelope in the street addressed in Rogers' hand-writing to the Bank of British North America enclosing a draft for \$3000 and requesting them to put that money to his credit; surely the defendants could not interpose between the bank and Rogers, without proving that Rogers did not owe the Bank of British North America, and that, therefore, it was his money. I think that the defendants, having obtained the money through the mistake of the plaintiffs, or their agents, which is the same thing, the burthen of proof is on them to prove that this money came into their hands free from any lien of the Bank of British North America, or any other parties. There is considerable difficulty in the case in a Common Law Court; but, after hearing a second argument, I adhere to the view indicated in the phonographic report of my former judgment in the Division Court, which I had no opportunity to revise, but which is substantially accurate. The best remedy in this case would have been in Equity, where all the parties concerned could have been brought in as parties to the suit.

TROOP ET AL. v. JONES.

Before McDONALD, C. J., and WEATHERS, RIGBY, and THOMPSON, J. J.

(Decided March 31st, 1884.)

Marine Insurance.—Constructive total loss.

PLAINTIFF's vessel, badly injured at sea, was towed into Guantanamo where there were no facilities for repairs, and where she should have had to remain, exposed to the depredations of worms, until spars, &c., were brought from New York. The owners abandoned but the underwriters refused to accept and made the necessary repairs at a cost greater than the value of the vessel restored.

Held, a constructive total loss of the vessel.

This was an action on a policy of insurance issued by the Nova Scotia Marine Insurance Association, of which defendant was a member, on "the hull, material and appurtenances" of the brigantine *Rebecca Neilly*. The risk was to continue for the period of twelve months from the tenth day of May, 1881.

The vessel left Aquin, Hayti, on the 8th November, 1881, bound to New York with a full cargo of dyewood. Strong winds and heavy seas were encountered causing the vessel to leak, and, on the 11th, the foremast head was carried away. The captain, finding it impossible to proceed, bore up for St. Jago de Cuba, off which port he arrived on the afternoon of the 14th. On the same afternoon the vessel was struck by a heavy squall which carried away the rest of the foremast, and the maintopmast, mainmast head, jibboom, and all attached. Shortly afterwards the vessel was spoken by a Spanish mail steamer and towed into the port of Guantanamo. Two surveys were held, the reports of which represented that there were no facilities at the port of Guantanamo for repairing and re-sparring vessels, and that by the time men and materials could be brought there to fit the vessel out her bottom would be riddled with worms in such a manner as to make her almost if not entirely unfit for further sea service; also that the hull was much strained and showed great signs of weakness. The cost of repairs was estimated at \$6,000, and the value of the vessel after being repaired, if not wormed, at \$4,500. On the 17th of November the insured gave notice of abandonment to the underwriters, and in the present action sought to recover as for a total loss.

The agent of the underwriters arrived at Guantanamo on the 22nd December, and succeeded in repairing the vessel and getting her ready for sea by March 10th, the necessary material having been procured from New York.

The cause was tried at Halifax, May 5th, 1883, before THOMPSON, J., without a jury who gave judgment for plaintiffs for the amount claimed with interest. The learned Judge stated the reasons upon which his verdict was based as follows:—

“I thought the abandonment justifiable and the constructive total loss theory sustainable.

1st. By the vessel's condition and situation at the time of the abandonment (irrespective of subsequent events confirmatory of this view.)

2nd. By the evidence of value after repair.

3rd. By the actual cost of the repairs.

Having arrived at this conclusion it seemed to me that the plaintiffs were entitled to the verdict, notwithstanding the repairs effected by the underwriters, and the endeavours of the underwriters to restore the vessel to the plaintiffs.”

A rule *nisi* was granted to set aside the verdict on the usual grounds.

Henry, Q. C., in support of rule.—The only questions are whether the Judge was right in deciding that the cost of repair exceeded the value when repaired, and whether the negligence of the captain contributed to the loss. The Judge had no right, in estimating the cost of repairs, to take into consideration the prospective damage by worms. If the owner allows a month to go by, during which rapidly destructive agencies are at work, you cannot take such damage into consideration in estimating the cost of repairs, and value when repaired. Promptness, despatch and decisive action must be assumed as necessary. The captain's duty is to exercise the utmost vigilance, and the question is whether the defendants are to suffer on account of the captain's negligence. The negligence of the captain must be taken into consideration in determining the cost of repairs and value when repaired. The underwriters are not liable for damage done

ment was made, and Capt. Anderson, on behalf of the defendants, who refused to accept the abandonment, proceeded from Halifax to take charge of the wreck and undertake the repairs. The only statement which tends to qualify the inference of great injury being likely to be caused by worms to a vessel lying so long in such waters, is the vague assertion that the owners and captain could have done the work which was necessary for getting her away to New York in less time than it took Capt. Anderson to accomplish the task. So much for the condition and situation of the ship. Of her value after the repairs were completed there are various estimates. The Captain says: "If she was not wormed, and the repairs were put on her, she might be worth \$5,500, or perhaps more, to any one who wanted her." This gives us little information until we ascertain whether she was wormed or not. Soule was one of those who examined her after the cargo was discharged, and was a ship-master of twenty-four years experience, chiefly in those waters. He says, "I should not have undertaken to repair her for the reason that before the materials could have been brought out the vessel's bottom would have been ruined." Albert Spencer, the surveyor for the Bureau Veritas Classification Society of New York, had thirteen years experience in superintending the construction, surveying and classification of sailing vessels. He examined the bottom of the vessel after her return from Guantanamo and says that the growth and progress of the worms, after they have once entered the planking, is gradual, and that the interior of the planking may be considerably wormed while the surface would show little or no indication of it. He "found the bottom more or less pricked with worms in many places. On the edge of the plank they were very bad and still alive. Many of the bottom planks would require to be taken out and new ones substituted. * * Probably about one-tenth or one-fifteenth of the surface of the bottom that was immersed was more or less pricked. In some places I should say that three-fourths of a plank was destroyed and then, in other sections, there would be but few worms." His last examination was on 17th April, 1882, and then the repairs had not been entirely completed, but I gather from

his evidence that the repairs which had been done had not been effectual as regards the removal of the worms from the places in which the repairs were completed. He says :—" On the 17th I found that several of the worst wormed planks had been removed and replaced by new ones. In other places the plank had been cut out in back to about half the depth of the plank, preparatory to putting graving pieces in, but the worms were still in some places, that is, extended further in than where the graving pieces would terminate. In many of these places the worms more than half penetrated the plank. It is a fixed rule that when the worms have penetrated through more than half of the plank the plank is to be removed entirely and a new one substituted. I could not approximate to the number of worms. There may have been 500 worms in the space of one foot. In some sections—the worse wormed planks—there was probably a worm hole to every square inch ; they would probably average that. That would be about the condition of the other sections where the worms were. * * I know all the worst wormed planks were removed, but then those other portions or sections of the bottom that were eaten with worms, that had pieces put in, still left portions of plank, behind the graving pieces, that were wormed so that the repairs were insufficient. * * I just saw the plank where the graving pieces were intended to be put,—saw holes that they had cut out to put in the graving pieces, and the worm holes extended beyond the bottom of the graving pieces. I should think in some places, half or three-quarters of an inch beyond. I did not make as close an inspection as I would have made if she had been repaired under my inspection. My inspection was not a careful and rigid one ; that is, not as much so as it would have been if the vessel had been classed in our institution. But it was sufficient to satisfy me, as an expert, that her bottom was defective in the particulars which I have mentioned at the time of such examination." Charles M. Holder is a New York ship-wright with twenty years' experience, and did the repairs to the vessel's bottom under the direction of the inspectors of the Shipmasters' Association in which the vessel had been classed. He says in his evidence :—" Our firm did

the repairs. Whatever the inspectors directed were taken out, I had no judgment in the matter—nothing to do whatever as to that. I could not tell you now how many pieces we did put in. There were no other defects besides worms that I saw. Nothing else the matter with the keel. My attention was drawn to the orders I had. Those men went round and marked, 'take out this, that, and the other',—marked what to do. Of course they had all to say about it as they were going to take her in. That is the way we understood it. We took out all the plank that they thought was necessary, but there were some few plank that were pricked with worms that we did not take out, but which I think ought to have been taken out. Still they thought they did not go in far and that they would not do any injury, and they did not order us to take those out, and they were not taken out. I would like to have had them taken out. I think they ought to have been taken out to make the vessel more seaworthy. It would have been better to have had them taken out. * * I don't think they were all removed, that is, all the defects, when the repairs were completed. She was seaworthy, and as I looked at her I thought she was in fair condition, and the inspectors passed her as such. Where planks are pricked with worms they are oftentimes left in the vessel because they are not considered deep enough to injure the plank. In my judgment from what I saw of those left after the repairs were completed I would rather have had them out. I did not know whether they would injure the vessel or not because I did not go into them to see what extent they were in. My duty was to do what the inspectors told me to do. That was my judgment merely without an examination—just from the external appearance and without examining how far they went in. I did not think they impaired the seaworthiness of the vessel. A vessel may run for some time without the plank being taken out,—may run a life time, but the object is to remove all plank that ought to come out. In my judgment those planks would not have been just as good for use or wear, with those holes in, as if they were not in. They would have been more crumbly and the vessel would not have been seaworthy. The vessel could probably run for some time but the plank

would be more crumbly and would finally become thin from the crumbliness of the outside of the plank. The planks were not as good, with those holes left there, for use as they would have been if the holes were not there, still the vessel might have been seaworthy, at the same time. Sometimes worms operate on the outside surface of the plank, and sometimes they go in. When the holes are large on the outside surface they are not deep. I would rather have had those places out, would have taken them off. The plank would not last as long with those holes in as they would if they were out. They would crumble away faster. * * If I had my own judgment to follow I would have taken out additional planks. There were wormy planks left in that in my judgment ought to have been left out. If I had been acting from my own judgment as a shipwright, I would have taken those out, in order to make the repairs complete. I would have taken more of the plank out. If I had been simply repairing her to make her fit to go on a voyage, to make her seaworthy, and did not want to go to any more expense than was necessary, I might not have taken them out. She was tight, in good seaworthy condition; that is, I considered her seaworthy, but if she had been a vessel of mine I would not have let her go in that way, would have insisted on having more plank taken out, most certainly. Still the vessel was tight at that time, in the summer. She lay there all summer, and she might have been good for several voyages." To meet this evidence, Thomas Stepher, the person who superintended the rigging of the wreck at Guantanamo, gives us this single line:—"In taking out the worm eaten planks, we took out whatever had a sign of worms on them." Benjamin T. Glover, one of the inspectors mentioned by Holder, says:—"We cut out what we thought was necessary, and also put in some half way pieces; in my judgment, all that was necessary to put her in good condition. I think the repairs were on my direction. I marked the places where they were to be put in. It was done in order to keep the class. She was classed by this work, I think, and I think she was classed for the Shipmaster's Association, and that this work was to be done for her to continue her character or class. I cannot say how extensive the repairs

were. I cannot say simply that we cut out more or less plank and put in some half way pieces. We cut out, as I said before, all that was necessary. I don't think we cut out every piece of plank that had a worm hole in it. We cut out every one that we thought would make the vessel any better by cutting it out. I presume there were plank left that were wormy in the surface." The certificate was restored after the repair, but, with the evidence standing in this way, I could not conclude that the Captain should be taken as having given us evidence from which we can conclude that the restored vessel was worth \$5,500, when he had pre-fixed the qualification; "if she was not wormed."

But defendants' counsel told us at the argument that they relied chiefly on the valuation of W. J. Lewis, one of the plaintiffs. He says:—"Her sound value, or if repairs had been completed properly, I would estimate at \$5,900, taking out worm-eaten parts of the vessel's defective keel, &c., re-fastening vessel as described by New York surveyor, and new set sails." The evidence, I think, makes it clear that the repairs were not completed properly; and that they were not completed properly within Dr. Lewis's meaning is apparent, because he says:—"If I had been offered \$5,000 for her when she was in New York and I had the knowledge of her condition I have now I would have jumped at it. * * The vessel being in the condition described by the witnesses examined I would not give \$2000 for her. I mean at the time when the repairs were completed. My experience as a shipowner extends over twelve or fifteen years, and I have had to do with repairing vessels and fitting out vessels for repairs." The "New York surveyor" to whom he refers was Spencer who said that the vessel ought to have been re-fastened in the bilges and keel. The evidence derived from the inspection of a piece of plank from the vessel, picked up on the shore where she was afterwards wrecked, on the way to Halifax to be tendered to the plaintiffs, and half burned, I consider very trifling. Next we have the estimate of value given by Capt. Anderson, who caused all the repairs to be effected for the defendant and the other underwriters. He was a somewhat sanguine witness, and somewhat interested, as being the

person on whose judgment, skill and diligence the underwriters had relied in their enterprising and spirited endeavours to prevent the loss from being total, although I do not believe that he would willingly mislead us a hair's breadth. He says:—"I think she was worth \$5,000 or more. Freights were very high then for such sized vessels. Believe I could have got more than that for her if had had power to sell her." His evidence confirms that of Spencer and Holder as to the incompleteness of the repairs, for when shown the fragment of the wreck which was exhibited in court with worm marks on it he says:—"Neither I nor any one else would take out such a piece as that, but would put in a graving piece." Why was not the graving piece put in then? And of how many other parts of the vessel would he have had to say the same, after the reflection which he was able to give to the subject by the time of the trial, if the opportunity of examination had been afforded, as was afforded in the case of this fragment? Then Spencer, the New York surveyor, of the "Bureau Veritas" says:—"I would estimate her as somewhere about \$2,500 in value." Holder says:—"She was worth perhaps about \$2,500 to \$3,000. That would cover her value after the repairs were made." These two witnesses, besides being disinterested, probably knew better than Capt. Anderson, whose residence and occupation are in Halifax, what the value of the vessel in New York was, and that is the place at which her value is to be determined, because she was not repaired until she got there and she never reached any other port. Anderson, Spencer and Holder are the only witnesses speaking to value who had an opportunity of judging the adequacy and extent of the repairs, and we thus have Anderson naming \$5,000, Spencer, \$2,500 and Holder, \$3,000. Let us now consider the cost of the repairs. Capt. Anderson gave us, as the cost of the repairs, these items:—

"Spars.....	\$607.31
Blocks.....	106.35
Sails.....	445.86
Sails repaired	41.36
Blacksmith's account.....	423.92
do.	46.76

Carried forward\$1671.56

<i>Brought forward</i>	\$1671.56
Ship Chandler.....	735.86
Fitting Rigging, &c.....	150.00
Classification.....	10.00
Freight on materials.....	284.00
Riggers' acct. in Cuba and Survey	140.00
Caulkers' acct. and sundries.....	381.00
Repairs in New York.....	518.55
	\$3,890.97 "

But to these must be added :—

Bill health and telegram.....	\$ 4.40
Telegrams.....	56.00
Commissions.....	200.00

These would bring the total to about \$4,150, and nothing has been allowed for the wages which should have been paid to the master for the four months which were occupied in the repairs, even assuming that the master could have done all that was done by Capt. Anderson and by Stephens who superintended the rigging at Guantanamo. There is no allowance for insurance of the vessel to New York, nor for what the wrecked materials might have produced at Guantanamo as to which we have Mr. Belcher's valuation for salvage purposes, (as agent of defendant), of \$1,500, and the evidence of Soule :—"There was a party in Guantanamo at that time that I think would have bought the vessel for a cattle trader, as he had an old wrecked vessel at Port Padre and could have transferred the sails and rigging from one vessel to the other. That was what he said to me and went so far as to come from St. Jago de Cuba to examine her and said he would buy her if sold." Then there is the vessel's share of several items which would go into general average adjustment, such as :—

Salvage.....	\$315.00
Labor on cargo.....	107.80
Two items mentioned by Anderson {	104.00
but not explained..... {	156.00
Custody.....	224.00
Tonnage dues.....	9.30
Port charges.....	178.00

Total.....\$1094.10

What the vessel's proportion of these would have been we know not, but it was an element to be considered. There should perhaps be an allowance for the freight, or a portion of it which would be earned on the vessel's arrival in New York, but a very small proportion of that had been earned at the time of the mishap as the vessel had only been three days out. I think that when we have considered all these items of expense we shall have considerably over-reached the estimate of value given by Anderson, (even if his estimate was not too high), by Spencer or by Holder—given, in short, by any one who knew the condition of the vessel after the repair. Finally, Mr. Wright shows that according to the account in the books of the company, whose officers managed the whole business, the disbursements were \$6,800. The point taken with regard to the conduct of the captain was that he was guilty of negligence in not remaining by the vessel to assist in the repairs, but as we have already arrived at the conclusion that he was justified in the abandonment, and as he had no duty to the underwriters after Capt. Anderson had arrived and taken charge for them, nothing more need be said on that branch of the argument.

It follows from all that has been said that the rule *nisi* for a new trial should be discharged with costs.

WEATHERBE, J.—The only question raised at the trial and argument, (and on the argument the case was amended by consent of counsel so as to submit that one question,) was this:—"Did the insured vessel receive such damage by the perils insured against that the cost of repairs would exceed the value of the repaired vessel. That was a question in view of the evidence in this case entirely of fact and I did not see how the finding of the learned Judge who tried the cause could have been different. Would a prudent owner uninsured have repaired the vessel? The vessel after the disaster at sea was towed into a port of refuge, and there was not at that place material or skilled labor to repair her. Besides, owing to the character of the climate, delay would be likely, on account of worms, to endanger the vessel's bottom. All these things were essential to be taken into consideration in

determining the expediency or possibility of undertaking repairs—whether those repairs could be completed so that in the result the value of the repaired vessel would exceed the cost of the repaired vessel. In this case the owners undertook to abandon the damaged vessel. The underwriters refused to accept the abandonment on the ground that the loss was only an average loss and they sent an agent to the port of refuge—which necessitated delay—who undertook to put the vessel in such a state as would enable her to reach New York, where her repairs could be more efficiently and economically completed. The result of these operations on the part of the underwriters fell far short of the success anticipated, and the actual cost of these repairs, including everything that is chargeable, exceeded what the underwriters and their agent estimated. The bottom of the vessel became injured by reason of destruction caused by worms during the delay in the tropical climate, and, though repairs to the bottom were made in New York, they do not seem to have been altogether effectual or complete. There is a diversity of opinion as to the value of the vessel when repaired, and I think, beyond all question, it was quite competent for a jury, or a Judge acting in that capacity, in assessing the cost of the repairs and the value of the repaired vessel, to say that the latter fell short of the former. But we must, in a case of this kind, not omit to observe, and we must carefully consider, that neither the actual cost of the repairs made upon a damaged hull nor the relative proportion of such cost to the value of a vessel so actually repaired, though a guide in determining the question, is by any means conclusive on the issue directly to be determined. The result of actual operations is no more conclusive against the underwriter, where such cost exceeds the value, than it is conclusive against the assured where the value of the repaired vessel exceeds the cost of repairs. Still the question remains, “what would a prudent uninsured owner have done?” And so in this case I consider it quite a legitimate argument on the part of defendant’s counsel that the unfavorable result was owing to the master’s negligence in the port of refuge under directions from the owner. There can be no doubt, I suppose, if it could be shown that by

prompt action on the part of the master, or any one else, the vessel could have, by temporary repairs, been taken, before time had elapsed to permit the work of destruction commencing in the vessel's bottom, to a port of repair, so that the cost of repair would have been so diminished and the value of the repaired vessel been so enhanced that the operations would have turned out profitably instead of unprofitably, that the plaintiff would fail in this action. That is clear; but it is not quite the test to apply to this case. It is not incumbent on the defendant to show negligence on the part of the master. If, in making out that the vessel could not be profitably repaired as the plaintiff is required to do, it does not appear that the master has acted with that promptness and vigilance which a prudent uninsured owner would have exercised, or if he has failed after the wrecked vessel was once safe in port to prevent deterioration in value from happening, so that profitable repairs became thereby impossible, the underwriter, I think, will not be bound. It was said at the argument that we had decided in *Almon v. Prov. Was. Ins. Co.* that the negligent conduct of the master did not, in any case, prejudice the rights of the assured, but we decided nothing of the kind. What we there held was that in the case before us for the loss which, though occasioned in consequence of the negligent conduct of master and crew, had been proximately caused while the vessel lay stranded on the open coast by the peril insured against, the underwriter was liable. It is quite another thing when the negligence happens after the peril is past. Unless it be made to appear that by due diligence and prompt business-like action the wrecked vessel could not be profitably repaired, the plaintiff must fail. The onus is on plaintiff. And the question is, has this been made out in the case before us. Prompt and vigilant action is not necessary to be shown,—no effort of any kind need be put forth,—where it is made out that expense or effort would be useless and worthless and wasted. In the present case it would, I think, have been useless to have made any effort or incurred expense short of that sufficient to have completed temporary repairs so as to have removed the vessel to a safe port of repair. Therefore the question to be decided before putting forth

effort or incurring any expense whatever was one of difficulty perhaps. Was the delay and want of effort in this case wilful and culpable, or was it such as might have been expected from the reluctance of a prudent man to undertake an unprofitable adventure in the attempt to restore his own uninsured vessel? That was a question of fact. Has the plaintiff made out that the refusal to act promptly in commencing repairs was prudently and wisely exercised. Even if the delay were wilful and the motive corrupt in resolving to abandon without enquiry as to the real state of the disabled vessel, if the result clearly disclosed that repairs would not have been undertaken by a prudent and uninsured owner, I do not see how the underwriter could be excused. However that may be, there is sufficient evidence, I think, to support the finding that repairs would not have been undertaken by a prudent owner, and, for that reason, I am of opinion that the rule *nisi* for a new trial should be discharged.

KINNEY, ASSIGNEE v. JONES ET AL.

Before McDONALD, SMITH, JAMES, WEATHERS and RIGBY, J. J.

(Decided March 31st, 1884.)

Effect of insolvency on the mortgage of ships.—Merchant Shipping Act.

THE provisions of the Insolvent Act of 1875, with respect to conveyances made in contemplation of insolvency, apply to mortgages on ships, notwithstanding the provisions of the Merchant Shipping Act as to such mortgages, and the provisions of the said Act and the Imperial Act to remove doubts as to the validity of Colonial laws.

WEATHERS, J., dissenting.

This was an appeal from a judgment of the learned Equity Judge, in a suit brought by plaintiff as assignee under the Dominion Insolvent Act of 1875, and amending Acts, of Thomas B. Flint, setting aside a mortgage of certain shares in the ship *Tsernogora* made by Flint, within the period of three months prior to his insolvency, to the defendants, and recorded under the Merchants' Shipping Act of 1854.

Meagher, Q. C., and Pelton, Q. C., in support of appeal.—We rely, first, on the fact that the mortgage was given in

pursuance of an agreement made the fall previous, to give security, provided the defendants would further assist plaintiff in his business, which they did; *Merchants' Shipping Act of 1854*, sections 66, 70, 71 and 72. The provisions of the Insolvent Act are inconsistent with the provisions of the Merchants' Shipping Act, by virtue of which the mortgagee is deemed to be the absolute owner of the property, and may dispose of it as such. The provisions of the Merchants' Shipping Act being inconsistent with the Insolvent Act, the latter can only have effect if the requirements of section 547 of the Merchants' Shipping Act have been complied with; that is, the Insolvent Act, so far as it affects the rights of owners under the Shipping Act, must first have been approved by Her Majesty-in-Council, and then proclaimed (WEATHERBE, J.—Your contention is that under the evidence the mortgage is not void, but that, even if it is void under the Insolvent Act, in consequence of the English act, the mortgage cannot be questioned.) Yes. The Equity Judge was wrong in holding that there must be such a contract between the parties as would be enforced in a Court of Equity. If there was an agreement to give security it would be enough to relieve the contract from the imputation of having been made in contemplation of insolvency. (WEATHERBE, J.—Flint says, "When I was in New York in the fall of 1876, I had a conversation with Snow and Burgess about drawing on them, and told them that I would see my account protected in case anything happened, and mentioned as among the securities the *Tsarnogora*." Could that be stronger, if instead of in case anything happened, he had said, "In case I become insolvent?" We don't think it has that construction.) The fact that after the agreement was made, Snow and Burgess allowed Flint to increase his liability from \$4000 to \$5000, shows good faith. They did not know him to be insolvent. (WEATHERBE, J.—What did he mean by "if anything happened?") He may have meant if one of his vessels was lost, or if one of his endorsers became insolvent. That would be different from contemplation of his own insolvency. All the details of the agreement to give security need not be expressed. In the words of a late decision, it may be "vague and

indefinite." It is sufficient if there is evidence enough to rebut the presumption of intention to evade the statute; *Ex parte Wilkinson, In re Berry*; L. R., 22 Ch. Div., 788; 17 *Grant's Ch. Reps.*, 570; 6 *B. & S.* 314; 4 *H. & N.*, 1; 1 *El. & Bl.*, 15; 6 *El. & Bl.*, 296; 8 *El. & Bl.*, 789. (McDONALD, J.—I don't think there is any difficulty about the effect of an agreement. The difficulty is about the agreement itself. I think the previous agreement itself was evidently in contemplation of insolvency.) If that was so why was not the mortgage given at once, and why were the subsequent advances made. The members of the firm all swear that they did not know Flint was embarrassed.

Every Canadian Statute relating to shipping has been reserved for royal assent. If it were not for the Insolvent Act the defendants, under their mortgage, would have been able to treat this vessel as their own. (McDONALD, J.—When the Dominion Parliament were given power to pass an Insolvent Act, they were given power to pass all clauses essential to give it efficacy.) Without proclamation? (McDONALD, J.—Yes.) There never could have been an intention to permit the Dominion Parliament to repeal clauses of an Imperial Act. (RIGBY, J.—There is no repeal, express or implied.) The Merchants' Shipping Act says that no registered mortgage of a ship shall be affected by an act of bankruptcy committed by the mortgagor after the date of the record of the mortgage. (RIGBY, J.—That refers to the law in relation to bankruptcy in force in England at the time.) The Merchants' Shipping Act was passed with the view of being applicable to the colonies. If that act is controlled by the Insolvent Act it must be on the ground that the Dominion Parliament has the exclusive right to legislate in respect to shipping, and that the right of the Imperial Parliament to legislate in respect to the shipping of the Dominion is taken away. That this was not the opinion of the Imperial Parliament was shown in 1869, when an act was passed to regulate the coasting trade of the colonies, in which Canada was expressly mentioned.

Bingay, Q C.—The act must be construed in the light of laws which were in existence at the time it was passed. The

act cannot be said to have any application to a Canadian Insolvency Law, as the Dominion of Canada was not in existence at the time it was passed. The only words used in reference to bankruptcy are peculiarly applicable to the English Bankrupt Act. This mortgage, if given under the same circumstances in England, would be void, as being itself an act of bankruptcy. The act of bankruptcy, in England, fixes the time when the property vests in the trustee. The contention on the other side amounts to this, that because a mortgage is registered, you cannot attack it, no matter how bad it may be. If section 72 of the Merchants' Shipping Act conflicts with the Insolvent Act, the latter act has been passed in conformity with section 547 of the Merchants' Shipping Act, which provides the manner in which acts affecting that act are to be passed. (WEATHERBE, J.—Has the Insolvent Act been proclaimed?) It is for the other side to show that it has not been proclaimed. (WEATHERBE, J.—It is not a good act under section 547, unless the conditions have been carried out. If you wish to make use of the act, under section 547, for any other than its ordinary purposes, it is for you to show that the conditions of that section have been complied with.) Under section 56 of the British North America Act, bills which have received the assent of the Governor-General are sent to Her Majesty-in-Council, who must express her disallowance of them within two years. The only thing to be proclaimed is the Order-in-Council disallowing the act. The burden of proof is on the party attacking an act to show any informality in the manner in which it has been brought into force. The British North America Act must repeal the Merchants' Shipping Act, so far as it affects legislation concerning bankruptcy and insolvency in the Dominion. In the case of the "India," 2 *Maritime Law Cases*, 193, the law in reference to the effect of acts is succinctly put. The moment a bill receives the Governor-General's assent it takes effect at once, and remains law until it is disallowed. Where the Governor-General reserves his assent to a bill it does not go into effect until it is assented to. This is the distinction between the two classes of bills under the British North America Act. The Insolvent Act includes shipowners in the class of traders. One of the

parties to the mortgage having failed to appear, the mortgage cannot be sustained as to the other. This is not the mortgage contemplated by the parties at the time of the promise ; cites *1 A. & E.*, 72 ; *L. R.*, 7 Ch. Apps., 534. In *1 B. & P.*, 68, the transfer was set aside.

Graham, Q. C.—When the Merchants' Shipping Act was passed there was a Bankruptcy Act in force in England, which will be found in *1 Chitty's Statutes*, 271. The statute defines what shall be an act of bankruptcy. It is committed by a trader doing certain things. There is no such thing as an act of bankruptcy apart from a bankrupt law. The phrase "act of bankruptcy" had a particular meaning at the time. The use of the words in the Merchants' Shipping Act refers to the English Bankrupt Act, and is controlled by it. It was, perhaps, an omission in not taking into consideration that there were English ships outside of England. It only protects the English mortgagee against the assignee under their own Bankrupt Act, and has no application to the colonies. Our act does not repeal the clause of the Shipping Act in reference to mortgagees, because it is an exception which has no application to the colonies. It was never intended, when the Merchants' Shipping Act passed, that the title of the mortgagee should be absolute, at all events, no matter how acquired. (WEATHERBE, J.—We must all concede that, but, if the title would be good in the absence of the provisions in the Insolvent Act, does not the Insolvent Act set the title aside?) It does not repeal, or attempt to repeal, any provision of the act. The mortgagee has all his rights still. (WEATHERBE, J.—The Insolvent Act says another thing shall be deemed fraudulent.) It can do that. The title of the mortgagee was valueless as against the English Bankrupt Act, notwithstanding sections previous to section 72 of the Merchants' Shipping Act. Section 72, was introduced for the protection of the mortgagee against the Bankrupt Act. (RIGBY, J.—It seems to me the words after the word "notwithstanding," in reference to the apparent possession, indicate the reason sufficiently.)

Pelton, Q. C., in reply, cites *British North America Act*, sec. 57. All the acts in reference to shipping passed by the Dominion

Parliament have been reserved for the assent of the Queen in Council. Under sec. 91, sub-sec. 10, the Dominion Parliament has the same power in reference to shipping and navigation, that it is contended they have in reference to insolvency. The fact that they have not exercised the powers in the former case, is proof that they do not claim to possess them in the latter. The British North America Act gives the Dominion no greater power than the Colonies, collectively, had before the passage of the act. Dominion Legislation, in reference to shipping, is subject to the control of the Imperial Parliament, and cannot be exercised in any way repugnant to Imperial Acts. Cites *Merchants' Shipping Act of 1863*, 32 Vic., chap. 11, sec. 7. This act provides that in the construction of the Shipping Act, and amendments Canada shall be deemed to be one British possession. (JAMES, J.—There is no inference to be drawn from that clause, further than that the Colonies are to be treated as one.) The assignee has no right to come in, except for the Insolvent Act, and the acts which avoid the mortgage are acts which would not avoid it except for the act.

RIGBY, J., (March 31st, 1884,) delivered judgment as follows:—

At the argument of this appeal we were all of opinion that the mortgage which was sought to be set aside in this suit had been given in "contemplation of insolvency," and in violation of the provisions of section 133 of the Insolvent Act of 1875; but it was contended by counsel for appellant that that section of the act did not apply to a mortgage upon a ship, subject to the provisions of the Merchants' Shipping Act, 1854; for, as it was alleged, it would be a repeal either wholly or in part of those portions of that act which related to such mortgages, particularly sections 66, 70, 71 and 72, and therefore, a violation of section 547 of that act, under which it was contended no such repeal could be made by the Dominion Legislature, without the approval of Her Majesty having been first given to the act and proclaimed in Canada. It was also urged that, even if section of 133 of the Canadian Act did not amount to such repeal, or part repeal, it nevertheless was repugnant to the provisions of the Merchants'

Shipping Act referred to, and came within the purview of section 2 of the Imperial Act to remove doubts as to the validity of Colonial Laws, (chap. 63 of 28 and 29 Vic.) and was, therefore, void and inoperative, as far as the mortgage in question was concerned. On these contentions only we called upon the counsel for the respondent. Sections 66 and the subsequent sections of the Merchants' Shipping Act, 1854, relating to mortgages upon ships, made it necessary that such mortgages should be in a specified form, and subject to the system of registration created by the act; but, apart from the provisions in section 71 giving the mortgagee power absolutely to dispose of the ship, the act gave him no new rights in addition to those which he would have had if that act had not been passed; and, by section 70, it was provided that he should not, by reason of his mortgage, be deemed the owner, nor the mortgagor deemed to have ceased to be such, except in so far as might be necessary for making the property available as a security for the debt. The effect of these provisions is to make the title of the registered mortgagee paramount to that of any one claiming under an unregistered title, and to enable him to take possession of and sell his security at will, without the tedious and vexatious delays that might supervene if he was relegated to the ordinary common law remedies of a mortgagee of personal property. Apart from these, there is nothing in the act to remove mortgaged shipping property from the operation of those laws to which all other property is subject, or from which we are to infer that a mortgage of a ship, once registered, confers upon the mortgagee such a complete and absolute property that under no circumstances can such title be impeached. When that act was passed we had no bankrupt or insolvent law in Nova Scotia, yet the Imperial Parliament must have contemplated the transmission of property in ships by bankruptcy, insolvency, or other means outside of the provisions of the act, as will be seen on reference to section 58. Afterwards the British North America Act was passed, by which the Imperial Parliament conferred upon the Parliament of Canada the power exclusively to make laws relating to "bankruptcy and insolvency" in Canada; and it seems to me that it would be

as unreasonable to urge that, if the British Parliament had, since the passage of the Merchants' Shipping Act, legislated in the terms of section 133 of the Insolvent Act of 1875, that they thereby repealed any section of the former act, or that the latter legislation was in any respect repugnant to the former, as to say that such was the effect of the Canadian legislation. There is no provision in the Insolvent Act of 1875, which, either expressly or by implication, can be held to interfere with the status of a mortgage of a British ship as established by the Shipping Act, or with the mortgagee's absolute power. What it does do is to declare that an insolvent trader, in Canada, shall not make transfers of his ships in contemplation of insolvency. If the Merchants' Shipping Act had declared that a registered mortgage of a ship should confer an infallible title, notwithstanding the bankruptcy or insolvency laws then in force, or thereafter to be enacted in any British possession, there would be some stable foundation for the present contention; but, in my opinion, the argument now would be as forcible, if this mortgage was sought to be set aside because it had been obtained by duress, fraud, or under other circumstances which would render it void at common law. The phrase "act of bankruptcy" in section 72 of the Merchants' Shipping Act, is obviously intended to refer only to a state of things which, under section 67 of the act to amend and consolidate the laws relating to bankrupts, (chap. 106 of 12 and 13 Vic.) the bankrupt law then in force in England, was indicated by that expression. Under section 125 of that act it was provided, that "if any bankrupt shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale alteration or disposition, as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy." And it is apparent that the object of the provisions of section 72 of the Shipping Act was to remove ships from the provisions of the section just quoted, and to disable the Court from ordering a sale of a mortgaged ship for the benefit of the creditors, although it remained in the possession and disposition of the mortgagor.

as reputed owner, where the "act of bankruptcy" had been committed subsequent to the registry of the mortgage.

I am of opinion that the appeal should be dismissed with costs.

MCDONALD and JAMES, J J., concurred.

WEATHERBE, J.—This application, on the part of the assignee in insolvency, was by way of bill in Equity to set aside the mortgage made in Nova Scotia, in conformity with the "Merchants' Shipping Act, 1854," of England, of shares in a ship registered also in this province in conformity with said act. By section 133 of the Insolvent Act of 1875 of Canada any transfer of any property made by any person in contemplation of insolvency by way of security to any creditor shall be null and void, and the subject thereof may be recovered back for the benefit of the estate by the assignee; and if such transfer be made within thirty days before the issue of a writ of attachment under the act, it shall be presumed to have been made in contemplation of insolvency. The mortgage in question was made within such thirty days, and words are unnecessary to show that in this case the transfer was made in contemplation of insolvency, within the meaning of the Canadian Insolvent Act. This application by the assignee to have this mortgage declared void and the registry cancelled is founded entirely upon the statute passed by the Parliament of Canada in force at the time of the transfer. But for this statute, it is admitted that the assignor had a right to prefer his creditor, and this transfer of his shares in the ship would stand. The mortgage is made and registered according to the provisions of an act of the Imperial Legislature extending to and in force in this Province, and it is a purely statutable transfer. The question now for us to determine is whether this transfer and registry, made under an English act, shall be annulled and cancelled upon an application to this Court, founded on a Canadian act, declaring transfers made as this was void. It will be observed that the Merchants' Shipping Act, in addition to the provision for the transfer of ships, has expressly provided for cases where the owner becomes insolvent, whether in England or abroad

in a British possession to which the act extends, and there would have been no difficulty whatever, as suggested in the judgment appealed from, but for the transfer in this case previous to the attachment. Our act for the relief of insolvent debtors was in force when the Merchants' Shipping Act was passed, and if an assignment had been made under that act, or, probably, an assignment by a person unable to pay his debts, or an order or decree of Court had been made requiring a transfer or conveyance of a ship, or shares in a ship, the person in whose favor any of these things were made would, it may be assumed, have the right to have such ship or shares registered in his name. Mr. Pelton, defendants counsel, told us he was misunderstood by the learned Judge in Equity, in the argument before him, and he does not pretend that, in a case of insolvency, the ships of the insolvent do not pass to the assignee under the insolvent act. In that respect the Canadian Insolvent Act is in no way repugnant to the Imperial Act, nor does it interfere or clash, but, on the contrary, it is in harmony with the Imperial Act. All that he contended for was,—and the question has never been raised in this Province,—that, where a title has been acquired under the provisions of the Imperial Act, it cannot be disturbed either in the Colonial possession or in Great Britain except by an act repealing those provisions, and where those provisions are repealed, as in the case before us, by a Colonial Act, that repealing act must be confirmed in the manner pointed out by the Imperial Act itself. Ample provision is made by the Imperial Legislature to meet such a difficulty as has arisen here in the colony. Any provision of this Merchants' Shipping Act, binding in a particular way on the colony, may be repealed by the colony if the proper measures are taken. Provision is made in the act itself for that purpose, and in the act itself the effect of bankruptcy in England upon a mortgage on a ship is dealt with; but there is no express provision made to meet such an occurrence in a British possession abroad. The sections of the Merchants' Shipping Act principally relied on are as follows:—

43. * * Subject to any rights and powers appearing by the register book to be vested in any other party, the registered

owner of any ship or share therein shall have power absolutely to dispose, in manner hereinafter mentioned, of such ship or shares.

66. A registered ship or any share therein may be made a security for a loan or other valuable consideration, and the instrument creating such security, hereinafter termed a "mortgage," shall be in the form marked I. in the schedule hereto, or as near thereto as circumstances permit; and, on the production of such instrument, the Registrar of the port at which the ship is registered shall record the same in the register book.

71. Every registered mortgagee shall have power absolutely to dispose of the ship or share in respect of which he is registered, and to give effectual receipts for the purchase money; but if there are more persons than one registered as mortgagees of the same ship or share, no subsequent mortgagee shall, except under the order of some court capable of taking cognizance of such matters, sell such ship or share without the concurrence of every prior mortgagee.

72. No registered mortgage of any ship or of any share therein, shall be affected by any act of bankruptcy committed by the mortgagor after the date of the record of such mortgage, notwithstanding such mortgagor, at the time of his becoming bankrupt, may have in his possession and disposition, and be reputed owner of such ship or share thereof, and such mortgage shall be preferred to any right, claim, or interest in such ship or any share thereof which may belong to the assignee of such bankrupt.

547. The legislative authority of any British possession shall have power, by any act or ordinance confirmed by Her Majesty-in-Council, to repeal, wholly or in part, any provisions of this act relating to ships registered in such possession, but no such act or ordinance shall take effect until such approval has been proclaimed in such possession, or until such time thereafter as may be fixed by such act or ordinance for the purpose.

Section 2 of chapter 63, Imperial Acts of 1865, 28 and 29 Vic., reads as follows:—"Any colonial law which is or shall be repugnant to the provisions of any act of Parliament

extending to the colonies to which such law may relate * * shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

For the purposes of this case it may be assumed that the Imperial Act goes no further than to make this statutable instrument a mortgage. That makes the mortgagee the legal owner of the ship. It may also be assumed that if he got such title at common law and without the statute, this Canadian Insolvent Act would make that title void. But the statutable instrument which would not otherwise be a mortgage, and would not give a title, is made effectual, and makes the mortgagee owner by virtue of the Imperial Act. His whole title and status depend on that act. That Imperial Act gives him his position. He is owner, and claims by that statute. How is he to be deprived of that title? How is that statutable title to be cut down and made void? By a Canadian,—a Colonial Act. Can it be said, therefore, that the provisions of the Imperial Act, upon which his whole title rests, are not interfered with by the Canadian Act? If the colony had power to repeal those provisions of the Merchants' Shipping Act, could it be said that our Colonial Insolvent Act does not repeal those provisions. And if the sections of our insolvent act relied on had been confirmed, according to the 547th section, can there be a doubt that the necessary repeal would be complete and effectual? If the mortgagee in this case, relying solely upon his title under the imperial statute, is to have that title destroyed by the Insolvent Act of Canada, can it be said that the provisions of this Colonial Act are not repugnant to the Imperial Act? If so, by the very terms of section 2, chap. 63, 28 and 29 Vic., the provisions of our insolvent act, as against the provisions of the Merchants' Shipping Act, are void.

MacLachlan, in his work on *Merchant Shipping*, ed. 1880, page 43, says, upon authority, in commenting on the nature of this statutory instrument, that the registered mortgagee is protected against the trustee in bankruptcy. Section 43 enacts that, subject to any rights or powers appearing on the register book, the registered owner shall have power absolutely to dispose of ship or share in the manner specified; and, by

section 71, the registered mortgagee shall have power absolutely to dispose of the the ship or share in respect of which he is registered. It is not pretended that this legislation was intended to take away the rights of parties over-reached or defrauded by the parties to this statutable transfer, or that it was intended to take away the power of an Equity Court to give relief according to existing law, but, subject to such rights, nothing, I suppose, could interfere with the transfer so established as this mortgage is by legislative enactment, except an act of the legislature. And it was admitted at the argument that legislation would, in England, be necessary to give the Court power to do what is now sought by this bill to be effected. Then suppose this section 133 of our Dominion Insolvent Act to have been passed subsequent to the Merchants' Shipping Act in England. Is it denied that it would have repealed the provisions of the Merchants' Shipping Act, which gives the mortgagee so undisputed a title. I put the question at the argument, and I understand it was admitted that the effect of such an act declaring void a mortgage valid under the Merchants' Shipping Act, was to repeal its provisions. But the argument of Mr. Bingay for plaintiff was:—

1. That section 547 of the Merchants' Shipping Act, empowering a British possession to repeal any provision of that act required to confirm the repealing act by Her Majesty-in-Council, has been virtually complied with.

2. That the publication of the act is a *prima facie* compliance, and the onus was on defendant to rebut the presumption to be drawn from publication.

3. That the powers given by the British North America Act respecting navigation and shipping and bankruptcy and insolvency, passed subsequently to the Merchants' Shipping Act, place Canada in a more advantageous position than other British possessions, and in effect repeal section 547, so far as Canada was required to obtain confirmation of a repealing act.

4. That the making of a transfer by the insolvent was an act of bankruptcy within the meaning of section 72 of the Merchants' Shipping Act, and, therefore, the mortgage is not to be preferred to the claim of the plaintiff as assignee.

With respect to the first and second of these contentions, I think it was incumbent on the plaintiff, seeking to declare void this transfer, to have brought himself within section 547 of the Merchants' Shipping Act, and that he has clearly failed to do so. It is said the British North America Act is a great statute, entitled to some peculiar construction by which extensive powers are to be held to have been conferred on Canada beyond the powers formerly wielded by the colonies which now form the Dominion, and more extensive than those enjoyed by any other colony. No doubt the powers conferred upon Canada by the Act of Confederation are extensive, but they were intended to be well defined. The question here is, "is there any power to repeal an Imperial Act extending to and in operation in this possession of the Crown"? I think no such power was intended to be conferred by the British North America Act, and that Canada is a British possession within the meaning of section 547 of the Merchants' Shipping Act. Indeed, this question is set at rest by section 7, chap. 11, of the Imperial Acts of 32 Vic., in which it is expressly provided that in the construction of the Merchants' Shipping Act, Canada shall be deemed to be one British possession. The question could only have arisen, I think, whether it formed one or several possessions within the meaning of the statute. Then I am of opinion that section 2 of 28 and 29 Vic, chap. 63 of the Imperial Acts is pertinent to this case; that is, section 133 of the Canadian Insolvent Act, in so far as it relates to mortgages made in compliance with the Merchants' Shipping Act, must be considered repugnant to the provision making that transfer an absolute title, as it does, and so must be read subject to that act, and to the extent of such repugnancy must be considered void. If this section 133 is not repugnant to, or, in other words, inconsistent or in conflict with the provisions of the Merchants' Shipping Act upon which this transfer is sought to be maintained I am mistaken as to the meaning of the phrase. It is, it seems to me, not only in conflict with, but (if not *ultra vires*) it overrides and annuls those provisions. The bill in this case is founded upon this section and stands or falls with it.

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Then as to the fourth ground of plaintiffs' argument the "act of bankruptcy" referred to in section 72 of the Merchants' Shipping Act must, I think, be read in the light of the Bankruptcy acts in force in England. "Acts of bankruptcy" are not defined by and are not recognized in the Canadian Insolvent Act, and the words used in section 72 were used in relation to the English Bankruptcy Act. It seems to me that if an Englishman holds mortgages on ships, some of them registered in Canada and some in England, both under the Merchants' Shipping Act, if they are not equally valid and valuable as securities it is because the insolvent law of Canada impairs the validity of those registered here. And if the Canadian Insolvent Law can impair or affect in any way the validity or value of a mortgage security on a ship registered in Canada, why not of one registered in England? The answer is because it would be in conflict with or repugnant to the Imperial Statute. The question to be decided, I think, is whether the plaintiff's application, founded on the Canadian Act, unproclaimed according to the provision of the Imperial Statute, to declare void a mortgage in this country, good under the Merchants' Shipping Act, and valid in the face of everything except the Colonial Act, can be maintained. And I am of opinion after having, though owing to the very large number of undecided cases before us, hastily considered all the points raised on the argument, that he cannot.

THE MERCHANTS' BANK v. THE STEEL COMPANY OF CANADA, LIMITED.

Before McDONALD, C. J., and WEATHERS, RIGBY, and THOMPSON, J J.

(Decided March 31st, 1884.)

Abandoning Debtor Process.—Attachments against Companies.—Levy and Appraisement.

When the appraisement shows that the appraisers were sworn and the sheriff's return refers to the appraiser's warrant, the swearing of the appraisers sufficiently appears.

"Service on the agent of process to appear," in sec. 28, esp. 97, R. 8., (4th Series,) means service on the company's agent of process requiring the company to appear.

Levy under the attachment under that chapter may be made before service on the agent.

The levy is effectual from the time of seizure of the property and not merely after appraisement and selection of the property to be held to respond the judgment.

The plaintiffs having attached property of the defendant company at Londonderry, in the County of Colchester, to respond a judgment which might be recovered in proceedings taken against the company to recover the sum of \$103,744.04,

Sedgewick, Q. C., (December 22nd, 1883,) moved to set aside the levy and attachment of the goods referred to in the sheriff's return, on the following grounds:—

1. Because the sheriff had no jurisdiction to make such levy until after service upon the defendant company's agent of process to appear, and such levy was made before such service.

2. Because there was no service upon such agent of process to appear.

3. Because the levy was made before appraisement of the goods levied upon.

4. Because the sheriff cannot levy until after appraisement, and in this case the levy was made on the 29th day of November, and the appraisement on the 3rd day of December following.

5. Because the appraisers were not sworn, and it does appear from the record that they were sworn, the oath taken by them not appearing in the sheriff's return to the writ of attachment, and because it does not appear when the appraisement was made.

6. Because the levy, appraisement and attachment were made and put in force against the defendant company after a winding-up order had been made against the company under the provisions of chapter 23, Dominion Acts, 1882.

7. Because the proceedings were proceeded with against the defendant company without leave of the Court, a winding-up order under the said act having been made against them.

Henry, Q. C., and *Ritchie, Q. C.*, contra.

THOMPSON, J., (March 31st., 1884,) delivered judgment as follows:—

The summons and attachment were issued in this cause under the provisions of chapter 97, *Revised Statutes*, (4th

Series,) relating to suits against "Foreign Companies." On 29th November, 1883, under those provisions, the plaintiff bank issued against the defendant company a writ of summons and also a writ of attachment, and against George Jamme, as agent or trustee of the defendant company, a summons to appear and disclose what goods or credits he had. On the 29th November the sheriff levied under the attachment. On the 30th he effected service on Mr. Jamme. On the 3rd December the goods were appraised. Mr. Sedgewick, for the defendants, at the argument, abandoned the two last grounds stated in his rule *nisi*, which were based on the winding-up proceedings. One objection, which can be disposed of in a few words, was that the sheriff's return did not show that the appraisers were sworn or state what oath they took. The return, however, states that the sheriff levied on the goods, &c., "an appraisement of which is hereto annexed," and in the appraisement so annexed the appraisers recite that they were duly sworn. The latter statement, coupled with the sheriff's return, which is to be treated as made under oath and in favor of which the presumption of accuracy exists, seems to be quite sufficient in the absence of anything to the contrary. Another objection was founded on the language of section 26, which says that "service on the agent of process to appear," shall give the Court jurisdiction. It was said that the meaning of this enactment was that, though the company be summoned, as was done here, by writ served on the agent, and though the agent be summoned to show what goods or credits he has to respond the judgment, still another writ, in which the agent should be required to appear himself and defend the suit, should be served. No such writ is provided for in the statute unless its requirement can be implied from the words just quoted; none is given in the forms in the Practice Act, among which are the forms to be used under this act; none has ever been used or considered necessary; and I think that the enactment is not to be considered as making necessary, by such casual words, a new process and a new practice, but is rather to be considered as speaking of the ordinary writ by which the defendant company is required to appear. The two objections principally relied on were:

1st. That the levy could not be made until the writ of summons was served on the agent ; and,

2nd. That there could only be a levy after appraisement.

As to the first, although the service on the agent appears by the words of the statute essential to jurisdiction, I think that the time for putting that principle into practice is when the Court or a Judge has to adjudicate on the case, as by assessing the damages, &c. If it can be said that the Court must have jurisdiction over the defendant before process can be issued or executed there never could be jurisdiction, because the defendant could never be served, nor could any other act be done on which subsequent jurisdiction is based. In the cases of proceedings against ordinary absent debtors, as provided for in the sections which precede those which relate to foreign companies, a seizure of property of the defendant was necessary to give the Court jurisdiction, and it might be urged with equal propriety in such cases that the writ of summons could not be sustained if issued before the seizure, because the Court had then not acquired jurisdiction. The words of the statute, it may be said, with regard to the time when the respective writs are to issue, are sufficient to meet such a contention, but the illustration is still in point, as far the principle is concerned. The object of the words quoted from the statute was, in my opinion, simply to dispose of the question of subsequent jurisdiction,—jurisdiction to deal with the suit,—and there was no intention to interfere with the most necessary and useful remedy of attachment which, by section 3 of the act, was made applicable to all suits brought under the act. The unreasonableness and inconvenience of the construction contended for would, of themselves, be sufficient to defeat the argument ; because, if such an objection be sustainable, the company's agent can defeat all the proceedings by evading service until the property is removed or disposed of.

As to the second objection, there is, perhaps, some little ambiguity in the wording of the statute. By section 4 the sheriff is to levy for the amount endorsed on the writ, and, by the next section, the goods are to be valued and, upon the appraisement being made, he is to levy on such part of the goods as shall be sufficient to respond the sum sworn to. The

obvious intention is that the sheriff may seize the property as soon as he receives the writ, and that he is, therefore, to have the appraisement made in order that the surplus property may be relinquished. To carry out this view the word "levy" is to be treated as not a strictly technical expression, but as being used in its general sense as equivalent to "seize." It must have been intended that the seizure first made, on receipt of the writ and before appraisement, should be operative and effectual, subject only to the relinquishment of the surplus; because, otherwise, the property which the writ was intended to secure might be removed, seized under execution, assigned, or otherwise made unavailable before the appraisement could be effected, and in very many cases could not be got at by the appraisers, as neither the sheriff nor the appraisers could have the right to obtain possession of it or even to get access to it. Such a construction is consistent with the act and with the practice generally pursued and is necessary to avoid the utter defeat of all the proceedings where the agent of the defendant desires to defeat them, or where executions are issued after the attachment and before the appraisement.

I think, therefore, that the rule should be discharged.

BARRETT v. SUTTIS.

Before McDONALD, C. J., and WEATHERS, RIGBY and THOMPSON, J. J.

(Decided March 31st, 1884.)

Negligence.—Power of Court to review evidence on appeal.—Demand and refusal.

PLAINTIFF brought action of trover and trespass for nets alleged to have been run over by the *M. A. Starr*, of which defendant was master, and judgment was given in the County Court for plaintiff.

Held, (WEATHERS, J., dissenting,) that the presence of the steamer at the place where the nets were fouled was no evidence of negligence, as there was uncontradicted evidence that they were not fouled in the place where they were set, but had drifted.

Held, further, that a demand of satisfaction for the nets destroyed was not a sufficient demand on which to base an action of trover for the remnants of the nets taken on board the steamer and saved.

Per THOMPSON, J., that even if there was evidence from which the County Court Judge had drawn an inference of negligence from the vessel being out of her usual course, such inference was open to review on appeal.

WEATHERS, J., dissenting, found that there was evidence enough for plaintiff to prevent a non-suit, and the Court could not, on appeal, review the finding of the Judge on the facts where the only ground in the rule for appeal was that the judgment was against evidence.

This was an appeal from a decision of the County Court Judge for District No. 7, in favor of plaintiff in an action of trover and trespass brought by him against defendant, the master of the steamship *M. A. Starr*, for running down and carrying away the plaintiff's nets while the steamer was passing out of Arichat harbor.

Defendant mainly relied on his fourth plea, in which he set out that the nets in question were set at or near the mouth of Arichat harbor, where the *M. A. Starr*, which was a regular packet boat, subsidized by the Government of Nova Scotia, touched on her voyages from Halifax to Charlottetown, P. E. I.; that, on the prosecution of one of said voyages the nets were carried away; that the defendant used ordinary and usual caution; that the defendant did not carry away the nets wilfully or maliciously; and, that the nets were so placed as to prevent the ingress or egress of the steamer to or from the harbor without carrying them away. The plaintiff replied negligence.

Weeks and Pearson in support of appeal.—The steamer was passing out of the harbor by the usual passage, and there is no evidence of negligence. We rely mainly on the fourth plea.

Meagher, Q. C. and Drysdale.—Negligence is specially replied, and to that no rejoinder is filed. (*Weeks*.—Negligence is alleged in the declaration and denied in the pleas. It cannot be alleged again.) There is no issue on the special allegation of negligence in the replication. (*RIGBY, J.*—The replication is substantially a repetition of the allegation in your declaration. The basis of your action is negligence. *THOMPSON, J.*—Your replication is either a repetition of the charge of negligence, or it is a departure.) It is an admission of the plea and an avoidance of it by the statement of negligence, in a manner consistent with the declaration. The third count is in trover and trespass. To this the defendant replies admitting the conversion, but setting out facts which he relies upon as a justification. Our reply to this is negligence. (*WEATHERBE, J.*—That is not a good replication.) The plaintiff has the right to fish and set his nets, provided he does not obstruct navigation; *Fishery Act*

of 1868, chapter 60, section 13, sub-section 2. We show where the nets were placed, and that if the steamer took the course the captain swears she did, he would not have gone near them. The nets had been set there for some time. There is some evidence that the vessel was out of her course, which would be evidence of negligence. There is no ground taken in the rule that the verdict was against the weight of evidence; 7 Q. B., 377; *Hall on the Sea Shore*, 45, note. The plaintiff's evidence is that the night was fine and that the nets would not drift; also, that they were not in the course of vessels going in and out. The defendant, in his cross-examination, says he has no doubt in his mind that he carried the nets away. (RIGBY, J.—Does not your own witness, who was on board the steamer, prove that she was on her proper course? WEATHERBE, J.—I think the judgment is wrong, but I fail to see that there is no evidence. THOMPSON, J.—I cannot see a fragment of evidence. WEATHERBE, J.—It has been decided by this Court that you cannot contend that a verdict is against the weight of evidence where the only ground taken is that it is against evidence. THOMPSON, J.—I dissented from that twice last winter, and I dissent from it now. WEATHERBE, J.—I am willing to review the decision, but we should do it carefully.) We are entitled to hold the verdict under the trover count. (MCDONALD, C. J.—There was no demand. It was merely an intimation that an action would be brought. RIGBY, J.—It is an intimation that the plaintiff wants a settlement. He does not demand the remnants of the net.) The demand is stronger than in *Thompson v. Shirley*, 1 Esp., 31. There need not be a specific demand. Defendant was served a week before the action with notice and did not return the nets or make compensation. No refusal was necessary. There was ample opportunity to return the nets, which was evidence of conversion; *Watkins v. Moody*, 1 Gow., 69.

Weeks, in reply.—The paper served was not a demand. There was no proof of authority on the part of Mr. Hearn to make the demand. The goods are not specified in the demand. (MCDONALD, C. J.—I think you need not say anything more on that point.) A mere scintilla of negligence is not enough to maintain this action but the evidence must be of

gross negligence. (RIGBY, J.—I don't understand the distinction. THOMPSON, J.—I think the persons in charge of the vessel were justified in going wherever the water would carry them.) Unless they deliberately ran down the nets. (THOMPSON, J.—That would be a trespass.) Yes, it would not be negligence at all. (WEATHERBE, J.—The weight of evidence shows that the nets must have drifted out, but it seems to me there is some evidence that the steamer was in where the nets were set.) The right of navigation is paramount to the right of fishing. The vessel had a right to be where she was, and the only negligence that there could be would be negligence in not looking out or in steering; *1 Camp.*, 517.

RIGBY, J., (March 31st, 1884,) delivered judgment as follows:—

This was an action to recover damages for the loss of two nets of plaintiff, run down by the steamer *M. A. Starr*, when in command of the defendant. The damages of twenty dollars allowed by the Judge of the County Court for District No. 7, could only have been awarded upon the assumption that the defendant was liable for the destruction of the nets, and to justify such finding it was necessary that the evidence before the learned Judge should have established the loss of the nets to have been occasioned by the negligence of the defendant in the management of the steamer. This was hardly disputed at the argument, though we were referred to sub-section 2, section 13, chap. 60 of the Dominion Acts of 1868, as recognizing the right to set nets as these were said to have been set. Admitting that there was evidence that the western passage, which was the one taken by the steamer on the night in question, was less safe than the southern one, and that the latter is the one commonly used, yet still it cannot be controverted that, the former being a navigable channel to and from Arichat harbor, the defendant had a perfect right to select it, provided he navigated it with due care consistent with the rights of fishermen and others. The evidence given by defendant's witnesses is uncontradicted and shows that the course steered on leaving Arichat was the usual and proper one, and this is corroborated by plaintiff's witnesses. Robert

Richard, and Sebastian Veino both show that the course alleged to have been steered by the *M. A. Starr* would take her further from the locality where the nets were alleged to have been set than the course which these witnesses would themselves have taken coming out through that channel; and Edward Gurnier, another of plaintiff's witnesses, an expert, who had followed the sea for forty-five years, thirty-two years as master, and who was a passenger on the steamer and on deck when the nets were fouled; says in his cross-examination:—"It is impossible to avoid nets at night by a vessel. * * * I cannot swear, if I was captain of that vessel, that I would have avoided the nets; it is impossible to avoid nets. I did not notice anything on the steamer that night which, from my experience as a sea captain, would indicate that anything was left undone that should have been done to avoid the nets; if anything had been in an uproar I would have noticed it. I don't think there was any negligence from any party on board." Plaintiff's counsel contended that the presence of the steamer at the place where the nets were set was some evidence of negligence. But there is uncontradicted evidence that the nets were not fouled at the place where they were alleged to have been set; and, although the plaintiff says he saw the nets on the morning of the day when the accident occurred, it is not shown that they could not have been moved in the meantime, to the place where, according to defendant's witnesses, the steamer should have been when she collided with them. The plaintiff, in his evidence says: "I have known of nets being adrift from various causes, heavy wind, or vessels or drift-wood." And I think we would have to conclude, if that fact was necessary for the determination of this case, that these nets had changed their position, in the face of the uncontradicted testimony as to the position of the *M. A. Starr*. I am of opinion, therefore, that there was no evidence of such negligence on the part of the defendant as would make him responsible for the destruction of the nets. Defendant's counsel urged upon us that plaintiff was, at all events, entitled to recover the value of the remnants of the nets taken on board the steamer, and that there was a demand and refusal of these, constituting sufficient evidence

of a conversion. The only evidence of a demand is contained in a letter of plaintiff's attorney to defendant, in which the latter is informed that the plaintiff has retained the writer "to take legal proceedings against you to recover damages for the loss of his nets, carried away by you one evening this summer; and I write to notify you that unless the matter is settled within one week, I will be compelled to issue a writ in the County Court." This letter was delivered to the defendant at Arichat, by a man who did not wait for a reply. The case of *Thompson v. Shirley*, 1 Esp., 30, was cited as an authority for the sufficiency of this demand. In that case, however, there was an actual conversion by the sale of the goods in question, which is referred to by Lord KENYON in his judgment as a reason why "the plaintiff could not demand the specific goods, but a satisfaction only." The letter in the case before us has no reference to the remnants of the nets which had been saved by defendant. It is merely notice of action to recover compensation for the destruction of the nets themselves. I am of opinion that it was not a demand of the portion of the nets saved, and even if it was, that there is no evidence of a refusal.

The judgment below should be set aside, and judgment entered for defendant with costs, including the costs of this appeal.

MCDONALD, C. J., concurred.

THOMPSON, J.—I quite concur in the opinion of my brother RIGBY. I can see no evidence on which the decision for the plaintiff could have been based. Even if the steamer had been out of the usual course, no inference of negligence on the part of her master could be drawn from that circumstance without further evidence to show that negligence was, or at least was likely to be the cause of the deviation. Even if there was such evidence as could have led the Judge of the County Court to draw such an inference, as I think there was not, his opinion, founded on that inference, is open to review or appeal more completely than his finding on a question of fact, in relation to which there was a conflict of testimony, would have been. In the case of the *Glunnibanta*,

1 Prob. D., 297, BAGGALLAY, J. A., said: "The parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect." And he added, in words that are applicable to this case: "In the present case it does not appear from the judgment, nor is there any reason to suppose that the learned Judge at all proceeded upon the manner or demeanor of the witnesses; on the contrary, it would appear that his judgment in fact proceeded upon the inferences which he drew from the evidence before him, and which we have really the same means of considering that he had, and with this further advantage, that we have had his view of the inferences to be drawn from the evidence, as well as the evidence itself, made the subject of elaborate and able discussion on both sides." The expressions used in the judgments in *Metropolitan Railway Co. v. Jackson*, 3 App. Cases, 193, and in *Dublin, &c., Railway Co. v. Slattery*, 3 App. Cases, 1155, are clear on the point, and conclusive as to it.

WEATHERBE, J.—The learned Judge of the County Court, after taking evidence on the trial, gave judgment for the plaintiff, and the defendant appeals from that judgment on various grounds, the only one of which available is that the judgment is against the evidence. Not having taken the ground that the finding is against the weight of the evidence, that ground is not open to him, and by the practice established by this Court, the only question is whether there was any evidence. In other words, was the plaintiff liable, on the whole of the case, to be non-suited, or, if there had been a jury, would the Judge have been obliged to direct them that there was no evidence, and that their verdict must necessarily be for the defendant? I have a strong opinion that the plaintiff was not liable to be non-suited, and, without offering any opinion as to the weight of it, it would be sufficient for me to say that, in my opinion, there is some evidence in the

case to support the issue in favor of plaintiff, and I have not been enabled, after carefully examining the whole of the testimony, as presented by a number of witnesses, to agree with my learned brethren, but have come to a very different conclusion. The defendant, master of a freight, passenger and mail steamboat, which, in her regular trips, is accustomed to touch at the port of Arichat, in leaving that port on a dark, though calm night in June, fouled the fishing nets of plaintiff set among a number of others, it is admitted, in a place out of the track altogether of the steamboat, and in a place used and occupied by the fishermen of Arichat, as was formally admitted on the trial, from time immemorial. There is no dispute about the place where the nets were set, and I did not understand that it was contended that steamers properly navigated, ever passed in those waters. The plaintiff swore they were not in the track of vessels going in and out; that all the channel was open; that he had set nets in the same place twenty years ago; that he had done so continuously for the last six years; that he never saw large vessels come near that place; that the course for a steamer to pass was distant two miles. Though the steamer in question would float on and might be navigated, as defendant admits, on this fishing ground, yet it is not necessary to cite fully the testimony which shows that it would be a dangerous situation for her on the night in question. One witness, speaking of a channel as a place where there is water for a vessel, pointed out that the place used for setting nets was not a ship's channel. The evidence of Richard and Veino show distinctly that the course taken by steamers going out of the harbor by the passage through which defendant's vessel steamed, would pass altogether clear of the place where plaintiff's nets were set. These witnesses were both pilots. The contention of defendant's counsel, indeed, was that the steamer's proper and actual course on the night in question, was far distant from these fisheries. There is no dispute as to what the proper track of the steamer should be, and I do not understand there is any denial that, except for a small vessel beating in, it would be negligent navigation to pass into or across the waters so used, time out of mind, by the fishermen

of Arichat. I put the question directly to defendant's counsel, and he admitted it was incumbent on him to show, as he undertook to show, that there was no evidence whatever that the steamer was on the fishing ground, but, on the contrary, that there was positive and uncontradicted testimony that she was in her ordinary and proper track, and that the nets, when the steamer came in contact with them, were not in the place where they had been set by the plaintiff, but that, from some cause or other, they were, at that time, directly in the course of the steamer's proper and ordinary track. The only question before us is this: "Is there no evidence whatever to show negligent navigation?" The evidence was not read to us at the argument, and the argument was not very satisfactory to me, but I took occasion to call particular attention to this point now under discussion, and obtain all the assistance from counsel possible, and I have carefully read over all of the evidence since. The contention was not that plaintiff had set his nets where they were first discovered fouled by the steamer. That was, I think, two miles from the fishing ground. The supposition advanced for defendant was that they had drifted to the channel where steamers pass, or that some small vessel had fouled them and carried them into the track of large vessels. But this was only a supposition. There was no evidence of it whatever. Richard, a witness for plaintiff, who has been for three years a branch pilot, and twelve or thirteen years at sea, an expert, swears he knows the proper course for vessels going out where the steamer *M. A. Starr* did, and in taking that course it would not be possible to run into plaintiff's nets where they were set. George Veino, a fisherman and seaman, who has been master of a vessel, and knows the harbor inside and out, now keeper of a lighthouse on the very passage taken by the steamer on the night in question, near the fishery in question, another expert, says that by taking the proper course the nets, where they were set, and his own were set about the same place, would have been avoided. The evidence of Sebastian Veino, another expert, confirms Richard in his evidence, that by taking the proper course the *M. A. Starr* would have avoided the nets where they were set. The plaintiff swore that his nets had been

set for ten days, consecutively, without having moved from their moorings two feet. He looked at their bearings every day. There were numbers of nets outside of his. He examined the nets in question the day before. They were new mackeral nets. The nets were fastened to moorings which had been down for ten days. The nets were examined every morning and the fish taken out. The nets were safe on the day the steamer in question left the port. Sometimes nets drift from heavy wind, but there was no storm that day, and the night was fine. On the morning after the nets were hauled on board of the steamer and they were missed by plaintiff, he discovered that the mooring of one of them was in its place and the other was gone. He distinctly swears there was no weather sufficiently rough to carry them away.

I cite this evidence to show that the presumption, at least, would be, (the steamer having become entangled in the nets,) that they were carried away from their moorings by that vessel, and in no other way. It might reasonably, however, be urged respecting one of the nets, that this was not necessary, for, on his cross-examination, the master admits, "I have no doubt in my mind that we carried away the net." And though the master swears he was on a course which, as a matter of fact, would preclude the possibility of his coming in contact with the nets at their moorings, this only shows he must have been mistaken in one or other of his statements. The plaintiff, who has been a fisherman for twenty-five years, who has followed the sea as a ship-master, and consequently a skilled witness, on his cross-examination, which was conducted at great length, proved that a vessel carrying passengers should have been more careful in choosing a channel in a dark night. That, I think, a jury might have inferred. And the defendant, who kept no log, says he knew that nets were set out in the same direction he was going, but did not know the locality, and though he had only gone out this passage on one occasion, swears he was going out at full speed. Edward Gurnier, an experienced ship-master of thirty-two years, a passenger on the night in question, well acquainted with the harbor, says there were two passages, the southern and western, and he was astonished on finding the steamer taking

the western passage. He asked the defendant why he did not take the other passage, when he replied, though as seen above he had only been once that way, that he was better acquainted with the one he had selected. And there is no evidence of his pilot's experience here, except that of the man who was entirely ignorant of it. Gurnier swears the nets were fouled about midnight. This is the time, according to the defendant's evidence, he left the wharf, and he does not mention at what time, or in what place, he came in contact with the nets. His pilot, on whom alone he says he depended, is not called, though he is proved at the time of the trial to have been in Halifax. The master says there was a man on the look-out, and though Morrison, a deck hand, who was all the time at the wheel, ventures to say the same, the master seems to have been the first to discover the fouling of the net at the bow of the ship, and this he discovered from the window of the pilot house, where he says he was watching the compass. And though the master, in his evidence, only swears to having destroyed one net, we have distinct evidence of the remains of more than one being taken on board; besides that of the resident agent of the boat at Arichat, called by the plaintiff, who informs us that he conversed about the nets rescued and on board, with the master, who asked him to see the plaintiff. And the master, beyond doubt, landed the remains of both plaintiffs' nets.

I think the master's evidence respecting the absence of the log, which the law requires him to keep, and his minute details as to his courses and distance from memory, and pretending there was only one net, and his admission, on cross-examination, of his ignorance of the western passage, which he had selected, as he told the witness, Gurnier, because he was better acquainted with that course than the ordinary one which he had formerly used, would have entitled the learned Judge justly to have discredited him as to the course he actually took; and I can well understand the finding to have been based on the natural and reasonable conclusion that he was out of his course, and that he carried away the nets from their moorings, where they might reasonably have been considered safe, except from careless conduct, such as was

manifested in navigating this steamer on the night in question.

Gurnier, the passenger already mentioned, was called evidently for the purpose of identifying the nets the remnants of which were taken on board. On his cross-examination a statement is got from him (1) that it is impossible to avoid nets at night, and (2), that he did not think there was any negligence from any party on board; and this was somewhat relied on at the argument to set aside the finding. To meet or counteract the very strong circumstances pointing directly, and it seems to me inevitably, to careless navigation in the waters and under the circumstances in question these two circumstances are not worthy of the consideration claimed for them,—scarcely, I should think, worth considering at all, and but for the weight attached to them, I would have passed them without the remark I have to make, viz., (1), if the opinion that it is impossible to avoid nets at night is to weigh in a court of law, then the law respecting negligence must be differently applied in such cases from every other, and (2), the facts constituting negligence are one thing, the law as to what amounts to negligence is another. It was for the Judge and not the witness, to settle that point. It must be quite obvious that while a fact coming within the knowledge of a skilled witness like Gurnier might decide the question of negligence beyond cavil, yet he, in the situation of a passenger might be, (as he seems by the evidence to have actually been,) unaware of a single fact to assist on the point of negligence, to speak to which he was not produced. He does not appear to have looked at the compass. Therefore, in the dark, he did not know the situation of the ship. Neither, for the want of examination of the compass, could he offer the slightest opinion as to the skill or care of the navigators. Moreover, he went to bed. Before retiring, however, he was unable to say whether there was a man on the look-out. And if there was, it seems he was incompetent. And if competent he might have saved the nets, which, indeed, would not have been in danger, (under cautious navigation,) as the passengers are proved to have been from the vessel going at full speed in the dark in a difficult channel.

The only way, as I view it, in which the learned Judge below could have arrived at a decision in favor of defendant was by finding that the nets had been removed from their moorings to a position, I think, nearly two miles away. There was no attempt, at the argument, to controvert this. It was not pretended either that the steamship had passed over the ancient fishing ground, or that if she had she could not have been directed in that course without an exhibition of careless, reckless, or incompetent navigation. Now there was no evidence, direct or indirect, to show that the nets had been removed, so that to the learned Judge critically examining the evidence with the chart before him and doubtless familiar with the waters of the harbor within sight of those attending the Court, the presence of the nets on the bow of the vessel—there was nothing to prevent them from having been dragged in the dark for some distance—spoke more convincingly, it may reasonably be to his mind, than the most self-confident witness. How did the master know, when he saw those nets dragged upon the deck, that his keel had not passed over the fishing grounds, or how did the witness, Morrison, know to the contrary? Neither of them had the slightest acquaintance with the route, and their evidence is all we have in the report to meet the very striking and forcible fact that they had destroyed nets which had been so carefully moored out of the proper track, which the steamer very likely would have pursued if she had been safely, skillfully, or even cautiously navigated. I am unable to see that this was not peculiarly a case for the Judge who had the witnesses before him, and whom the law recognizes as the fittest mind to weigh many significant indications and traits of character, and even hurried expressions, which it is impossible for the Judge to convey to us in his report. I am, and I know we all are, the more careful to weigh the evidence presented to us in cases appealed from the County Court than in cases where our own *nisi prius* decisions are under review, because, in the former case our judgment is final, and in the latter our opinions can be reviewed. We have before us several cases where our decisions turn entirely upon the evidence, and I am aware how much more likely judges are to hold different

opinions in such cases, than where legal questions are at issue.

Having arrived at the conclusion indicated, it is unnecessary for me to deal with the important question raised respecting the Canadian Statute, chap. 60, Acts of 1868, authorizing the setting of these nets where they were moored. Neither am I to offer any opinion as to the authority cited to show that plaintiff is entitled to recover upon the demand for the remnant of his nets, irrespective of the question of negligence. I cannot help thinking that the plaintiff, in this case, is entitled to our judgment, and though sometimes the law works great hardship, this is a case where I have no difficulty in coming to the conclusion that the question was one purely of fact, and regret very much that I am obliged to differ with my brethren, which I do with deference. The defendant is entitled to my opinion, and I must state that I have no doubt the appeal should be dismissed with costs.

BANK OF NOVA SCOTIA v. MCKERROW.

Before McDONALD, C. J., and McDONALD, RIGBY and THOMPSON, J. J.

(Decided March 31st, 1884.)

Irregularity in writ.—Want of signature of proper officer.—Want of seal.—Nullity.—Waiver.—Deputy Clerk.

THE writ of summons will not be set aside for any defect therein after appearance and plea, whether the defect makes the writ a nullity, or only irregular.

A defect which makes a proceeding a nullity will be considered as waived when the cause has gone to another stage in which the validity of the proceeding has ceased to be important.

The Deputy of the Clerk of the County Court held authorized to sign writs, although the Clerk be not ill, absent from home, or otherwise unable to attend to his duties.

This case came before the Court on appeal from the following judgment of James W. JOHNSTONE, Esq., County Court Judge for District No. 1:—

A rule *nisi* was obtained to set aside the writ in this case, on the ground that it had not been signed or sealed. The 28th section of the County Court Consolidation Act requires that all writs be signed and sealed by the clerk of the County

Court when the same are issued. The writ was signed by Mr. Craigen, who states that he is the Deputy Clerk, and as such Deputy has been in the habit of signing writs for the past eleven months; nevertheless I must hold that the writ was not regularly signed. By the latter clause of section 89, the County Court Consolidation Act, the clerk is only authorized to appoint a Deputy to act for him in cases where he is absent from home, is sick, or is otherwise unable to attend to his duties. There is no pretence that, in this case, the clerk was either sick, absent from home, or otherwise unable to attend to his duties had he been so minded; indeed, Mr. Craigen's affidavit plainly states that he has been accustomed for months past to do the duty of the clerk, under a general power of attorney. Such acting, in my opinion, is wholly invalid and unauthorized, and cannot fail, if persisted in, to lead to trouble and great irregularity. The Deputy which (the first clause of section 89,) the Governor-in-Council may require the clerk to appoint refers to appointments to act outside of the district where the clerk himself resides. It is admitted that the writ was not sealed with the seal of the court, as required by the Act, and therefore it can in no sense be said to have issued; and had the defendant elected to have considered it as mere waste paper, he would have been justified in so doing. But instead he chose to consider it as of value, and to appear and plead to it, and though it is clear that if a statute require the plaintiff to take a particular proceeding, and if such has not been adopted the court will consider that the omission renders the plaintiff's proceeding a nullity, and that a complete defect in the proceedings cannot, like a mere irregularity, be waived, yet in this case I consider that the fact of the defendant having appeared and pleaded changes materially his position. The object of *mesne* process is merely to bring the defendant into court, and he, having come in on the writ, has fulfilled its issue; he has appeared and pleaded, not to the writ, but to the declaration contained in the writ, and I am not prepared to say that when the writ and declaration were separate documents the defendant might not have said: "I waive the necessity of a writ; I will come voluntarily into court and answer your pleading," and I there-

fore think that the defendant, after having come into court by filing an appearance, and after having pleaded, cannot be heard to say: "The process which brought me here is bad; it was no process at all;" and I do not think that the fact that the defendant did not discern the defect till after he had come in and appeared can alter the case. At the same time there is no question but that the writ is essentially defective, and, as the plaintiff has asked to amend, I will give him leave for which he applies. He must pay the costs of these proceedings.

Weeks, in support of appeal.—The distinction between an irregularity and a nullity is that the one is voidable and the other void. An alteration in a writ without resealing it avoids it; 7 *Dowl.*, 745; 7 *E. & B.*, 49; *Day's Com. Law Prac.*, p. 3; 7 *H. & N.*, 753; 6 *M. & W.* 636; *Bouv. Law Dict. tit. Writ*; 3 *Bl. Com.*, 273; 1 *Tidd*, 93. (McDONALD, C. J.—You admit that if it is an irregularity it may be cured by appearance.) Yes. (McDONALD, C. J.—Then I understand Tidd to say that this very case of a writ not having a seal is an irregularity.) If that is so it disposes of the case, but I would like the court to hear me. The court cannot hold to be unnecessary that which the legislature has declared to be essential. The distinction between an irregularity and a nullity is shown in 8 *East.*, 547. Where the express words of the statute are violated the proceeding is a nullity; 2 *Dowl.*, 616. (McDONALD, J.—If you had not appeared you might have treated it as a nullity, but you did appear. What position would you have been in if the writ, as in the old practice, had been separate from the declaration, and there was no writ, but you had appeared and pleaded to the declaration which constitutes the record?) I will answer that presently. All I have to do at present is to show that the writ was a nullity. If that were the case nothing that I could do would revive it. (McDONALD, J.—Assuming that it is a nullity and is not waived the declaration and plea are there yet. In the old record there was not a word about the writ.) The signing of a writ is a necessity; 3 *Chitty's Practice*, 224. (McDONALD, J.—Supposing the writ is set aside will not the cause still go on?) Granting that it will, I am still entitled to whatever benefit I can get from setting the writ aside; 3

Chitty's Practice, 224 ; 2 *Dowl. Prac. Cases*, 182 ; 3 *M. & S.*, 553 ; *Siggers v. Sansom*, 2 *Dowl. Prac. Cases*, 747 ; 2 *Tyrrhitt*, 276. (RIGBY, J.—In some cases the statute says expressly the process shall be void where the terms of the act are not complied with. The result would be the same where the words of the statute are equivalent. It comes to a question of construction.) You cannot construe a word which has a peremptory signification in such a way as make a matter optional which the statute makes imperative ; 3 *East.*, 156. If the words, "shall be signed and sealed," imply necessity they are as strong as if words were added, as they have been in certain cases, expressly avoiding the act for non-compliance with the terms of the statute. In *Siggers v. Sansom* a writ was set aside as a nullity because the name of another county was inserted without resealing. (THOMPSON, J.—My difficulty here is not that the writ is a nullity as I am inclined to think it is, but that you have passed the stage when the writ has any function to perform. The object of the writ is to compel the defendant to come into court to answer the suit of the plaintiff, which he has done. This being the case why should we set aside the writ, even supposing it to be a nullity ? Suppose the case was at an end and the money claimed by the plaintiff paid. If we would not set aside the writ then why should we do so now ?) In *Siggers v. Sansom* the writ had equally served its purpose as the defendant had appeared. The only difference was that there was no plea. There is no distinction between waiver by appearance and waiver by plea. In *Clarke v. Smith*, 2 H. & N., 753, there was an alteration in the date of the writ and it was held not to be waived by appearance after notice.

Berden, contra, was not called on.

THOMPSON, J., (March 31st, 1884,) delivered judgment as follows :—

I think that the question involved in this appeal does not turn on the point of the want of seal making the writ a nullity. Much may be said as to its being a mere irregularity, but if it were a nullity the suit stood as though there was a declaration without a valid writ to bring the defendant into

court to answer the declaration. The defendant has, however, come in and has appeared and pleaded. Of what avail can it be now to him to raise any question as to the validity of the writ? We should not be asked to set aside a nullity unless some injury might result from the proceeding remaining, and no such injury appears possible here after the writ, good or bad, has served the purpose of a writ. The general principle that a nullity cannot be waived must be taken with some limitations. True it cannot be waived in the same way that an irregularity can—by merely taking any fresh step with knowledge of the irregularity, but even of a nullity it must be said that one has lost his right to complain if the cause has passed that stage at which it was material to consider whether the defective proceeding was valid or invalid. So in *Chitty's General Practice*, vol. 3, page 522, note (d) it is said: "A plea in abatement without a correct affidavit of its truth having been annexed may be treated as a nullity, and the plaintiff might sign judgment as for want of a plea. So if a specific plea requiring the signature of counsel be delivered without such signature, it may be treated as a nullity, and plaintiff might sign judgment; but in each of these cases of nullities if the plaintiff, instead of signing judgment, reply to the plea he waives the objections, and could not afterwards take advantage of it as before he might have done." In the same valuable work, on page 524, the author says: "A complete defect in the proceedings cannot, like a mere irregularity, be waived. But cases of this nature require much consideration, and it cannot be supposed that the doctrine is that a nullity in an early stage of the cause may not be waived; thus if a defendant plead in bar and there has been a regular trial and verdict, it is not to be supposed that the latter, or the judgment and execution thereon, would afterwards be set aside on the ground that there was no writ of summons or no formal appearance for the defendant entered." The authority of *1 Strange*, 155; and *Queen v. Ryerson*, 2 N. S. Decisions, 276, are directly in point. As I do not agree with the views of the learned Judge of the County Court as to the defect in the signature to the writ, I do not think that the objections taken below required an amendment, and therefore the rule *nisi* to

set aside the writ and subsequent proceedings should be discharged with costs and the plaintiff should have the costs of the appeal.

HILL v. McLEOD.

Before McDONALD, C. J., and McDONALD, RIGBY and THOMPSON, JJ.

(Decided March 31st, 1884.)

Misrepresentation as to quantity of land sold.—Promissory note.—Alteration after stamping.

In an action on a promissory note given in payment for land purchased by defendant from plaintiff the defendant relied on an alleged misrepresentation as to the quantity of land contained in one of the lots sold.

Held, there being no evidence that the misrepresentation, if made at all, was made falsely or with intent to deceive the defendant or to induce him to do that which he otherwise would not have done, that the defendant could not succeed.

At the trial exception was taken to the reception of the note on the ground that it was not sufficiently stamped. The note had been drawn up, signed and stamped in the defendant's absence. When it was tendered to him he required an alteration to be made in the date, which was done by common consent.

Held, that the alteration did not necessitate a re-stamping because it was at most a mere correction of an error, and was made before the note was delivered.

This was an action on a promissory note made by defendant in favor of plaintiff, for the sum of \$520, and given as part consideration for the sale of certain land. Plaintiff's writ also contained a count for money payable by the defendant to the plaintiff, for the sale of land. Defendant relied on alleged alterations in the note, and on an alleged deficiency in the quantity of the land. The cause was tried before THOMPSON, J., at Truro, in June, 1883. The plaintiff abandoned his second count at the trial, and the jury, acting under the instructions of the learned Judge, that the making of the note was not proved to have been completed before the alteration, that the alleged deficiency of the land was not proved, that the deficiency, after the deed, could not be made a set-off, that the defendant had been guilty of laches, and that the nature of the representation as to the land, did not relieve the defendant from enquiry, found a verdict for plaintiff on the first count for the amount of the note, with interest. A rule was taken

on the usual grounds to set aside the verdict and for a new trial.

Weeks and Pearson in support of rule.—The notes were altered after the execution, by being ante-dated twenty-five days, for the purpose of getting interest for that time. McLeod's evidence shows that the notes were given and the contract completed before the alteration was made. There was misrepresentation as to the quantity of land sold by plaintiff; *Joliff v. Baker*, L. R., 11 Q. B., 255. The deed corresponds with the representation upon which defendant was induced to purchase. (RIGBY, J.—Do you mean to say that where a promissory note is given you can reduce the consideration?) Yes, under our equitable plea. (THOMPSON, J.—I ruled at the trial that no deficiency had been proved. It is hardly worth while to consider the legal question, if the deficiency is not proved.) It never was pretended that the land did not contain less than was represented. The misrepresentation as to the quantity of land amounts to fraud, which may be taken advantage of by equitable plea in abatement of the purchase money; *L. R.*, 22, Chan. Div., 105; *L. R.*, 23, Chan. Div., 120; *Weekly Notes*, No. 49; *L. R.*, 19 Chan. Div., 175. (McDONALD, J.—You are going for an abatement of the price. What data have we for arriving at a conclusion as to the amount to be deducted from the amount for which the notes were given?)

Henry, Q. C., contra.—The burden is on the defendant to prove the deficiency. For this, strict proof would be required. There is no proof that the survey followed the lines of the deed. (THOMPSON, J.—The defendant admitted that the plaintiff only pointed out three of the lines. He promised to point out the fourth but never did it.) Suppose the principles of equity are to be applied, how can the jury exercise the functions of the Master in Equity, and reduce the amount? It is not like an assessment of damages. If the law in reference to damages is applicable the case is not one for equity. The defendant should have pleaded so as to show the misrepresentation and the extent to which it existed, and should have asked for a reference to ascertain the amount that should be deducted from the price.

Pearson, in reply.—(McDONALD, C. J.—The difficulty is that there is no evidence that the eastern line was pointed out to the surveyor or run by him, or measurements made by him.) There was evidence to go to the jury. The surveyor ran through a stump which was pointed out as being on the line. (THOMPSON, J.—You want more than one point.) There are other facts which, with that, would be enough to show the line. On the point of misrepresentation, the plaintiff stated that there was a specific quantity of land, but admits that he had no means of knowledge.

McDONALD, C. J., (March 31st, 1884,) delivered judgment as follows :—

This is an action on a promissory note, to which, with the usual pleas in bar, the defendant pleaded on equitable grounds, that the plaintiff and one Nancy Hill, his wife, in consideration of the sum of \$2400, by deed dated the 25th May, conveyed to the defendant, his heirs, &c., certain lots of land situate in Highland Village and Great Village, so-called, which said lots were particularly bounded and described in said deed, and embraced a certain lot particularly designated, and the defendant alleged that the plaintiff falsely and fraudulently represented to the defendant that the said lot of land contained and embraced in quantity two hundred acres of land, whereas in truth and fact the said lot of land so described did not comprise or contain more than one hundred and forty acres, leaving a deficit of sixty acres thereof, and that the value of the sixty acres of the said land would amount to a sum greater than the plaintiff's claim, and the defendant averred that the said lot of land was the most valuable of all the lots in said deed to him conveyed by the plaintiff and his said wife, and that the said plaintiff represented to the defendant that the said lot of land comprised and contained the said quantity of two hundred acres, whereby the defendant was induced to accept said deed, and to complete said purchase, and the defendant averred that he had paid to the said plaintiff the sum of \$580, which sum was more than sufficient to pay the full amount due him as the consideration for said purchase and conveyance. The facts,

as they appeared on the trial, are as follows:—The plaintiff owned a farm in or near Great Village, Colchester County, consisting of three hundred and fifty or four hundred acres; verbal negotiations between the parties during the Spring of 1881, resulted in a sale of this farm by the plaintiff to the defendant, of which a deed of conveyance passed to the latter on the 25th May, 1881. As will be seen on reference to the deed, the farm is described in that instrument in four different sections, or as four different lots, although, as I have said, these several lots composed, and were occupied and sold by the plaintiff as one farm. The deed described these lots to contain severally: No. 1, lying to the north of the main road, 150 acres, more or less; No. 2, lying to the south of the main road, 200 acres, more or less; No. 3, a lot of salt marsh, six acres, more or less, and No. 4, a lot of dyked marsh, of six acres, more or less. It will appear presently that lot No. 2, above mentioned, is the subject of contention in this suit. It appears from the evidence that the defendant had entered and taken possession of the farm on the 28th of April, 1881. Before the sale the plaintiff and defendant went upon the ground and the former pointed out the lines on three sides of the lot below the road, but not on the east side. The defendant alleges that previous to the purchase the plaintiff represented to him that this portion of the farm below the road contained two hundred acres, and that is the quantity of land represented in the deed, whereas, in point of fact, it contains only, as he contends, one hundred and twenty-eight acres, or seventy-two acres less than the quantity represented to him, and he claims a reduction *pro rata* computed according to the value per acre of this lot below the road on the price paid, and for part of which the note in dispute was given. The evidence as to the quantity of land actually contained in the lot below the road when sold is very vague and uncertain, and, as to a portion of it, I think it clear that the surveyor, Corbet, is mistaken in his calculations. It is unfortunate for the defendant that he did not notify the plaintiff of a survey, which was made for the purpose of fixing a serious liability upon him. The defendant himself did not pretend to be acquainted with the lines and boundaries of the farm, nor

does it appear from the evidence that Chisholm, who he says pointed out the lines, had the information which would enable him to do so correctly. Chisholm was not called, and if he had been, there is no pretence for saying that he had authority from the plaintiff to represent him on that survey. Another feature of this survey is certainly extraordinary, and I cannot help expressing my surprise that the surveyor should permit it. The chainmen were the defendant and his son, and although the plaintiff makes no accusation, I think he cannot be blamed for mistrusting, to some degree, the accuracy of a survey made under such circumstances. The surveyor, Corbet, made the lot between the shore and the road over one hundred and eighty acres, thirty-four perches, less five acres sold to Chisholm, and forty-seven acres and thirty-four perches deeded to one McLellan. These deductions were made by reference to the deeds conveying these small lots, and not from actual measurement, and as I have said, it is clear that the surveyor has made a mistake, arising from a careless perusal of the deed to McLellan. The deed from Hill and wife to McLellan gives one-half of a lot of forty-seven acres and thirty-four rods, or 23 acres and 67 rods, while the distances given by the deed, one hundred and thirty-five rods by forty, would make thirty-three acres and seventy-five rods, so that if we admit the survey in other respects to be approximately correct, the discrepancy would not be so large as the survey makes it. If the defendant chooses to come into Court on a survey made in this manner, in the absence and without the knowledge of the plaintiff, he will be held at least to present the results of that survey in such a manner as to command the confidence of the Court and jury. This, I think, he has not done in this case, and, were it necessary to determine that question, I could not say that I am satisfied he has established his allegation of deficiency in quantity. But, in the view I take of the matter, it is unnecessary to consider that branch of the case. The defendant's plea alleges "that the said plaintiff falsely and fraudulently represented to the defendant that the said lot of land contained and embraced in quantity, two hundred acres of land, and further, that the quantity of land in said above described lot was in and by the said deed declared and

expressed to consist of two hundred acres of land, more or less ; whereas, in truth and in fact the lot of land so described did not comprise or contain more than one hundred and forty acres. * * * And the said plaintiff represented to the defendant that the said lot of land comprised and contained the said quantity of two hundred acres, whereby the defendant was induced to accept the said deed and complete the said purchase." Now the onus of proving these allegations rests upon the defendant, and, before referring to the law governing the case, I will shortly consider the character of the evidence by which the defendant claims to have proved a "false and fraudulent representation by the plaintiff." The only evidence on the point is that of the plaintiff and defendant. The defendant says : "Before I purchased, plaintiff represented that this lot lying between the road to Great Village and Cobequid Bay contained two hundred acres. He said this at least three times. I bought the land on the faith of this representation." * * * "I would not have bought, as in the deed, and paid the price I agreed to pay, but for plaintiff's representations in that regard." In cross-examination he said : "Do not remember his telling me he never had the property surveyed ; he said 200 acres above and 150 below ; he never said so ; the day the deed was signed no conversation about quantities." * * * "All the lots constituted one property merely separated by the road ; do not know any reason why it should be separated into lots for the purposes of measurement." The testimony of the plaintiff on the point is as follows :—"Had farm fourteen years ; never had the southern portion surveyed nor did I know what it contained ; bought it as one property, it was all one farm, and sold it as one farm, and had never had the lots surveyed separately ; I told plaintiff I thought there were three hundred and fifty acres in the place, that I never had it surveyed ; I think so still ; do not remember making any representation to defendant as to the quantity below the road ; I thought there was the most quantity above ; made no representation of the quantity of any lot ; I sold it as one farm ; I did not make any representation such as defendant states." I ought to refer here, because I think it a very important, as well as a very just admission on

the part of the defendant to the admission made by his counsel on the trial, and thus noted by the learned Judge: "Weeks declares that he does not charge on the plaintiff any intention to deceive, and at my suggestion the question is withdrawn." Now, assuming for the present that the plaintiff made the representation, which he denies he ever made, is there any evidence that he made such representation falsely or with intent to deceive the defendant or induce him to do that which he otherwise would not have done? There is no such evidence and in its absence the defendant cannot succeed. "With some few special exceptions, a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects, either in the title to, or quality, or quantity of the estate which are not covered by the vendor's covenants." *Dart on Vendors*. "And in sect. 6, (says Mr. Justice WATKIN WILLIAMS, in *Joliff v. Baker*,) he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of actual falsehood and fraud on the part of the vendor, entitling the purchaser to a rescission of the contract, or where there is a total absence of the subject matter of the intended contract, and he expressly says that "a bill filed after conveyance simply for compensation in respect of defects, will be dismissed, and Lord ST. LEONARD'S Book is to the same effect. * * * "I am of opinion, in the first place, that it has been the established practice of the Court of Chancery that a bill for compensation properly so called, the purchaser retaining the property, could not be entertained after the completion of the contract and execution of the conveyance, and that the jurisdiction under which compensation was granted, was exercised only as auxiliary to specific performance, and was never exercised independently." * * "I am further of opinion secondly, that, after the purchaser has taken a conveyance, and the purchase money has been paid, no action can be maintained either at law or equity for damages or compensation on account of errors as to the quality or quantity of the subject matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised

upon the purchaser ;" WATKIN WILLIAMS, J., in *Joliff v. Baker*, 11 Q. B. D., 267, 269. This is the latest exposition of the law on the question afforded by English authority, and although not binding this Court, as a decision of the Privy Council would, will be accepted as the rule which would govern the decision of that high tribunal in a similar case. Now the defendant here rests his case entirely upon a representation which, although perhaps false in fact, was not false to the knowledge of the plaintiff making the representation ; nor is there any evidence that the representation was made with intent to benefit himself or deceive the defendant. As Mr. Weeks put it at the argument, the representation is false ; it is therefore a legal, if not a moral fraud and is sufficient to sustain the defendant's plea. I do not propose to enter into any discussion on the distinction between legal and moral fraud ; that question is most fully and ably dealt with by Mr. Justice WATKIN WILLIAMS, in the case to which I have already referred, *Joliff v. Baker*, 11 Q. B. D., 255, where the conflicting authorities are fully discussed, and the learned Judge adopts the words of the present Lord BRAMWELL, in *Wier v. Bell*, 3 Exch. D., 238, where he says : "I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold ; legal light or legal shade. There never can be a well-founded complaint of legal fraud, except where some duty is shown and correlative right, and some violation of that duty and right. And where these exist it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty." And in the same case Mr. Justice A. L. SMITH, referring to the subject of the above extract, said : "In my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the defendant has made a statement false in fact and fraudulent in intent." * * "If a man makes a statement which he believes to be true, but which is in fact untrue, even though he made it with the intention that another should act upon it, this, in my judgment, will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting." It might,

I think, be fairly argued in this case, that, on the defendant's own shewing, he has got as much as he bargained for. He says on his cross-examination that plaintiff told him there was 200 below the road and 150 above, and it appears from the evidence of the surveyor that there is 200 acres above the road. This, with an accurate survey of the land south of the road, would leave the defendant as much land as he says he was to receive. Exception was taken at the trial to the reception of the note, on the ground that it was not sufficiently stamped. I think the ruling of the learned Judge was right, as, on the defendant's own showing, there was no delivery of the note till after the alteration was made. Fountain was in no sense the agent of the plaintiff. He was simply the scrivener employed by the plaintiff to write the deed, and by the defendant to write the note. If the defendant had himself written the note, as he might have done, and handed it to Fountain in plaintiff's absence, that would clearly be no delivery to the plaintiff. When the note was offered to him on his return to the house, he at once refused to accept it, demanding a note dated on the first of the month. This was agreed to, and by common consent the date was altered. I do not think this necessitated a restamping of the paper.

The rule to set aside the verdict will be discharged with costs.

THOMPSON, J.—I concur in discharging the rule for a new trial, for the reasons stated to-day, and because I retain the opinions which I stated to the jury, as shown by the report of my charge. The alleged deficiency of land was not proved; no attempt was made to prove it but by hearsay; and the defence as to stamps failed both for the reasons stated by the learned Chief Justice, and because the alteration, which was said to require a re-stamping, was at most the mere correction of an error to make the note comply with the terms of the agreement under which it was given.

KANDICK v. ARTHUR.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J J.

(Decided March 31st, 1884.)

Clerk of County Court. — Writ signed by deputy. — Burden of proof.

A writ of summons was signed in the name of the Clerk of the County Court by a deputy appointed by the clerk, who, it was contended, could only appoint a deputy to act for him when he was "absent from home, sick, or otherwise unable to attend to his duties."

Held, that the onus was on the party seeking to avoid the writ to show that when it was signed by the deputy the clerk was neither "sick, absent from home, nor otherwise unable to attend to his duties."

The defendant applied to James W. JOHNSTON, Esq., County Court Judge for District No. 1., to set aside a judgment by default, which he had suffered to pass against him, together with the writ, record, and other proceedings, and for leave to appear and plead, on the ground that the Clerk of the Court did not issue the writ or mark said default, or enter said judgment, and on the further ground that the defendant had shown a defence on the merits and accounted sufficiently for his non-appearance. The application was supported by an affidavit of G. H. Fielding, the defendant's attorney, that the writ in the cause, the record, and the entry of the judgment were not signed by the Clerk of the Court, as they purported to be.

The signatures attached to the writ and other proceedings in question, and purporting to be made by the Clerk of the Court, were made by Nicholas E. Mulcahie, an employee in the office of the Clerk, under the authority of a power of attorney, by which he was constituted deputy clerk and empowered to sign the name of the clerk, as such deputy, and to do all acts required to be done by the Clerk of the Court as such.

The learned Judge was of the opinion that the defendant had not satisfactorily accounted for his non-appearance, or disclosed any defence on the merits, but made the rule absolute on the ground that the writ should be both signed and sealed by the clerk to give it validity, and that, except in cases where the clerk was absent from home, sick, or otherwise unable to

attend to his duties, there was no authority for the appointment of a deputy. Plaintiff appealed.

Tremaine, in support of appeal.—The question is whether the writ was regularly issued, being signed by a deputy appointed by the Clerk of the Court. (WEATHERBE, J.—Do you claim that the clerk has power to appoint a deputy?) Yes. (WEATHERBE, J.—Where does he get the authority?) Under the Act. Section 28 of the County Court Act of 1880, provides that all process *mesne* or final issued out of the Court shall be signed and sealed by the Clerk of the Court or his deputy. Section 29 provides that the Clerk of the County Court or his deputy shall exercise the same power as the Prothonotary of the Supreme Court. The section of the act on which the Judge bases his decision is section 8. Our contention is that the first part of the section presupposes a power to make an appointment, as no power to make the appointment is given. The clerk is not authorized to appoint a deputy but may be required to exercise the power which he has independently of the act. If a statute is necessary section 28 gives all the authority that could be required. As to power to act by deputy, see *Broom's Legal Maxims*, 840; 6 *Exch.*, 154, et. seq. Every ministerial officer at common law has power to appoint a deputy. 5 *Comyn's Dig.*, 195, is authority for the position that a deputy should act in the name of his principal; *King v. Bedford Level*, 19 Am. Dec. 64. In this case acts were held good and binding even though the attempt to delegate authority was invalid.

Fielding, contra.—The object of the act was to have deputies appointed in districts outside of Halifax, where the clerk cannot be present in person. The appointment in the present case is not for a section, but is general. (WEATHERBE, J.—As long as he is appointed in Halifax the statute is complied with.) There is nothing to show that the Governor-in-Council has required the clerk to appoint a deputy. (THOMPSON, J.—The statute, in my opinion, is remedial. Where the clerk does not exercise his power of appointing deputies and the public convenience requires it, he may be required to make the appointment.) If there is a statutory authority in addition to the common law authority we must assume that the

statutory authority is to be followed. It is not shown that the appointment was to be exercised during the clerk's absence or illness. At common law an office importing trust and confidence could not be deputed; *16 Viners' Abridgement*, 116. If the clerk has power to appoint a deputy, the writ must be signed either by the one or the other. If the deputy signs he must sign as such.

A. McDonald, in reply, cites *Clark v. Bradlaugh*, L.R., 7 Q.B. Div., 151, showing that the act of signing a writ is a ministerial and not a judicial act. In *6 Exch.*, 154, it was held that a woman who had a power of attorney from her husband to sign promissory notes, though she could not depute her authority, could get her daughter who was present to sign for her. An attorney cannot depute all his authority but may employ another to perform a particular act. Acts of officers *de facto* are as effective as far as third persons are concerned as if they were officers *de jure*; *Burke v. Elliot*, 42 Am. Dec., 142; *Hildreth v. McIntyre*, 19 Am. Dec. 61; *Broom's Legal Maxims*, 841. Under the words of the statute the clerk has power to appoint a deputy during absence or illness.

RIGBY, J., (March 31st, 1884,) delivered judgment as follows :—

It seems to be abundantly clear that where a deputy or agent executes any writing for his principal it is sufficient that the name of the latter should alone be affixed, without any statement to show that the act was by the deputy or agent, that being a fact which may be shown *dehors* the document. LAWRENCE, J., in *Wilkes et al. v. Back*, 2 East., 142, says at p. 144: "But here the bond was executed by Wilkes for and in the name of his principal, and this is distinctly shown by the manner of making the signature. Not that this was even necessary to be shown, for if Wilkes had sealed and delivered it in the name of Browne, that would have been enough, without stating that he had so done." The learned Judge of the County Court is of opinion that the maxim *omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium* would have applied to this case

"had not the plaintiff had an opportunity of showing, in answer to the rule, the authority of the party to sign the name of the clerk, and failed to avail himself of the opportunity." I have no doubt that the maxim does apply, for the authorities show that it has been held applicable to the case of a weigh-master of a market town; 6 *H. of L. Cases*, 970; to Churchwardens and Overseers of a Parish; 8 Q. B., 1037; to Surrogates; 3 Camp., 432; to Vestry Clerks; 2 M. & W., 206; to Deputy Sheriffs; 11 M. & W., 581; but I can find no precedent for the qualification stated by the learned Judge, which seems to me opposed to the very language of the maxim, which is, that everything is to be presumed to be rightly done and duly performed, until the contrary is shown, *i. e.*, until the contrary is shown by the person attacking the regularity of the proceedings; not until the person upholding these proceedings has had an opportunity of showing that they are regular, and has not availed himself of it; for that would really be to throw the onus upon the latter in all cases, instead of giving him the benefit of the presumption which the law raises in his favor. If, therefore, the deputy of the County Court has only power to sign writs of summons in the name of the clerk, in the cases specified in section 8 of the County Court Act, (which I do not by any means concede,) then the onus was upon the defendant to show that this writ was signed when the clerk was neither "absent from home, sick, or otherwise unable to attend to his duties," and not having done so, I think he must fail in his application.

The appeal, in my opinion, should be sustained with costs, and the judgment below reversed.

LEVIN ET AL. v. BRIAND.

Before McDONALD, C. J., and McDONALD, RIGBY, and THOMPSON, J J.

(Decided March 31st, 1884.)

Affidavit sworn without the Province.—Omission of seal.

An affidavit to set aside pleas was sworn without the province before a commissioner appointed to take affidavits for use within the province, but was not authenticated by the seal of the commissioner.

Held, that the affidavit could not be read.

This was an appeal from a decision of James W. JOHNSTON, Esq., County Court Judge for District No. 1, making absolute a rule to set aside defendant's pleas.

The plaintiffs, through the firm of Dun, Wiman & Co., placed an account against the defendant amounting to \$175.50, in the hands of a firm of attorneys in Halifax for collection. The defendant, upon being notified of this, wrote the plaintiffs October 2nd, 1882, that he had proposed to their lawyer "to pay \$78 on the 15th inst., and to give a note at thirty days from that date for the balance." The plaintiffs, on October the 5th, acknowledged receipt of this letter, and stated that they had advised their lawyers to accept its terms. The plaintiff's letter was handed by defendant to Messrs. Dun, Wiman & Co., and was by them on October 8th sent to the attorneys with whom the account had been placed for collection. A writ of summons having issued a few days later, and prior to the 15th, the defendant pleaded the agreement referred to above, in pursuance of which he had remitted to the plaintiffs the sum of \$78 cash, and had placed his note for the balance in the hands of their agents.

The appeal was argued February 11th, 1884, by *Hunt* in support of appeal, and *Mills* contra.

MCDONALD, C. J., (March 31st, 1884.) delivered the judgment of the Court:—

This is an appeal from a decision of the Judge of the County Court at Halifax, setting aside the defendant's pleas. The rule *nisi*, which was made absolute by the Judge below, was founded upon an affidavit made by the plaintiff, a resident of Montreal, in that city, and purports to be sworn before J. Duncan

Davison, commissioner for taking affidavits in Quebec for use in the Province of Nova Scotia. It was objected that the affidavit was not duly sworn, inasmuch as our statute requires affidavits made before commissioners abroad to be authenticated by the seal of the commissioner. Section 30, chapter 96 of *Revised Statutes*, (4th Series,) enacts: "All affidavits for the purpose of holding persons to bail in this Province, or having relation to any judicial proceeding in any Court of Justice therein, purporting to be made before a commissioner appointed to do acts without the Province, or a Judge, &c., * * * shall have the same effect as if made before a Judge or other lawful authority in this Province; provided the same purport to be sealed with the seal of such commissioner," &c. Section 53, chapter 94, *Revised Statutes*, appears to be limited to affidavits of a particular character therein specified, namely, affidavits of service of writ or notice, or any other affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against defendants out of the Province, or by such defendants," and does not include, as I understand it, such an affidavit as that we are now considering; but in my opinion the affidavits referred to in this section must also be authenticated by the seal of the commissioner. Section 59 of the County Court Act of 1880, enacts that "all affidavits to be used in the County Court or before a Judge thereof, may be sworn before a Judge, &c. * * * and when such affidavits are made by parties residing without the Province, they shall be sworn as provided in section 53, chapter 94, *Revised Statutes*." Now section 53, chapter 94, requires all affidavits therein referred to to be sworn before "a commissioner appointed to take affidavits and do acts without the Province." Section 57 of chapter 96, authorizes the appointment of commissioners to do acts and take affidavits without the Province, and section 30 of the same chapter requires all affidavits sworn before such commissioners to be certified by the seal of the commissioner. The affidavit in this case was not so certified and cannot be read. It follows, in the absence of other sufficient evidence to sustain the application, that it must fail. The appeal will therefore be allowed with costs.

MAHER v. HUBLEY.

Before McDONALD, C. J., and McDONALD, RIGBY, and THOMPSON, J J.

(Decided March 31st, 1884.)

Conversion.—Unauthorized sale of goods by widow of intestate.

The widow of an intestate disposed of a pair of oxen belonging to the intestate's estate for "a barrel of flour, cash, and other things," and applied the proceeds to her own sustenance.

Held, in an action of trover by the administratrix, that the buyer should have known from the manner of the sale that it was not made in due course of administration; that there was no reasonable ground for supposing that the widow had authority to sell; and that a sale for such a consideration was not a lawful one, or such as the administrator would have been bound to perform in due course of administration.

This was an appeal from a decision of James W. JOHNSTON, Esq., County Court Judge for District No. 1.

The action was by the administratrix of the estate of Philip Graves for the conversion of an ox which formed part of the estate of the deceased. The defence was that the ox was bought from a third party to whom it had been sold by the widow of the deceased, and that the widow, by intermeddling with the estate, had made herself *executrix de son tort*, and that, therefore, a sale by her would pass title. The defendant brought from one Gates, who bought from one Cleaveland to whom the ox in question with another was sold by the widow for a barrel of flour, with some cash and some other things amounting in value to \$50.

The decision appealed from was as follows:—I can find no acts done by the widow beyond this solitary one that would make her an *executrix de son tort*. The fact of her living on the property would not, for she had rights in it, nor would paying the funeral expenses, or the taxes, or the debts incurred in the purchase of nourishment for her husband during his last illness; and besides she appears to have paid these out of the proceeds of a ton of hay sold which had been taken off the place after the death of the testator. This ox was not sold in the interest of the estate in any way, but the money received was expended in the purchase of provisions for her sustenance and that of the men living in the house with her. It requires more than one act to constitute a party *executor de son tort*, and there is nothing here to give color to

the pretence that she acted in this instance in that capacity Her sale was no more than an act of trespass on her part, which would confer no title. Judgment for plaintiff for \$25.00).

Eaton, in support of appeal, cites *Parker v. Kett*, 1 *Ld. Raymond*, 661; *Mountford v. Gibson*, 4 *East*. 441; *Thompson v. Harding*, 2 *El. & Bl.*, 631; *Williams on Executors*, 296. Where the creditor sees the widow who is primarily entitled to administration, carrying on business, he is not put upon enquiry as he might be in the case of a stranger. If it is admitted that the widow was *executrix de son tort* her sale would pass property. Her act was as lawful as payment to a creditor. (RIGBY, J.—No, because a creditor is entitled to payment. McDONALD, J.—The creditor would only receive what is due him. That is not this case.)

Wallace, contra.—The defendant did not undertake to say that he had any reason to believe the widow to be administratrix, neither did the first purchaser, so that the question does not arise. (McDONALD, C. J.—The first purchaser says the widow paid him funeral expenses.) That would make her administratrix *de son tort*. (McDONALD, J.—If a horse was sold for the purpose of paying funeral expenses would that make her administratrix *de son tort*?) It might. There was not sufficient property to pay the debts. That makes the act a wrongful act in every sense.

RIGBY, J., (March 31st, 1884,) delivered judgment as follows:—

This was an action to recover damages for an alleged wrongful conversion by defendant of an ox, claimed to have been part of the estate of Philip Graves, deceased, of whom plaintiff is administratrix. A pair of oxen, of which this was one, was sold by the widow of the deceased to one Cleaveland, who sold to one Gates, from whom defendant purchased; and this was the title set up by the latter before the County Court Judge of District No. 1, from whom this case comes to us by appeal. The defendant contends that the widow of deceased was executrix *de son tort* of his estate, and that the sale by her to Cleaveland was sufficient to pass title to the oxen. The Judge of the Court below held, however, that she was not

such executrix. I do not consider it to be necessary for us to decide whether or not this ruling was correct, and whether the evidence was not sufficient to establish that there was such an intermeddling with the estate by the widow as to disable her from disproving such issue in an action by a creditor. That, however, is not the point to be determined in the case before us. It will be observed, on reference to p. 277 of the 8th edition of *Williams on Executors*, that the property in goods sold by an executor *de son tort* does not pass to the purchaser unless the party "with whom he deals has fair reason for supposing that he has authority to act as such"; and further, "that the act of an executor *de son tort* is good against the true representative of the deceased, only where it is lawful and such an act as the true representative was bound to perform." And these propositions are fully borne out by the cases. Most of the authorities are referred to in the case of *Thomson v. Harding et al.*, 2 El. & Bl., 630, in which Lord CAMPBELL said that a person might "clearly do wrongful acts which would render him liable to be sued as executor *de son tort* without giving validity to his alienation of the property of the deceased," and he held that the payments made to the defendants, creditors of deceased, by an executor *de son tort* could not be recovered back, because "the defendants, when the payments were made to them in satisfaction of the debt due to them from the intestate, might reasonably have supposed that he had authority to make the payments." In *Mumford v. Gibson*, 4 East., 441, GROSE, J., at p. 449, says that "to entitle a party to defend his possession against the lawful administrator, under a delivery by an executor *de son tort*, it must have been made at least in the course of administration; and it was incumbent upon the defendant insisting upon it to prove that it was so made." And at p. 450, LAWRENCE, J., says that "the only foundation on which a creditor of the intestate can in any case make title to a payment or delivery to him out of the intestate's property by an executor *de son tort*, is that he had fair reason for supposing that the person from whom he received such payment or delivery had a right to make it; as where such person avowedly took upon him the character

of executor and acted as such." See also *Buckley v. Barber*, 6 Exch., 164, where it was decided that the act of the executor *de son tort*, to be good as against the true representative, must be a legal act, and such an one as the latter would have been bound to perform in due course of administration. In the case before us the only act performed by the widow in connection with the estate, previous to the sale of the oxen and proved to have been known to Cleaveland, was the payment to him of one dollar and fifty cents for funeral expenses. He says he gave for the oxen a "barrel of flour, cash, and other things," from which I think he should have known that the sale was not in due course of administration and that she was not making it as executrix; as it is not usual for an executrix to barter away the estate for "flour" and "other things." There is no evidence to justify the conclusion that Cleaveland had reasonable ground for supposing that the widow had authority to sell the cattle, nor do I think a sale for such consideration a lawful one, nor such as the administrator would have been bound to perform in due course of administration. The appeal, therefore, should be dismissed with costs.

McDONALD v. McDONALD.

Before McDONALD, C. J., and WEATHERS, RIGBY, and THOMPSON, J.J.

(Decided March 31st, 1884.)

Ejectment.—Verdict by consent for plaintiff sustained.

PLAINTIFF proved title to land under two grants from the Crown, but never resided on or had actual possession of it, the land having been occupied and worked for upwards of twenty years by his father, who was put on the place by plaintiff and partly supported by him. After the death of the father the land was occupied for two years longer by a son who had lived with the father but was not proved to have had any possession distinct from him. The son having died, plaintiff brought ejectment against his widow. A verdict having been entered for plaintiff by consent, subject to the opinion of the Court,

Held, that the verdict could not be disturbed. If the possession of the father was not the possession of the plaintiff and the latter was not entitled to succeed on that ground, he was entitled to recover as heir to his father, the only right of the defendant being to dower in her husband's share of the land.

This was an action of ejectment brought by plaintiff to recover possession of two lots of land situate at Schooner

Pond, in the Island of Cape Breton, granted to plaintiff by the Crown by grants dated respectively, May 23th, 1847, and July 9th, 1860. The facts are sufficiently stated in the judgment of the Court. The cause was tried before WEATHERBE, J., with a jury, at Sydney, August 22nd, 1883, when, on the conclusion of plaintiff's evidence, it was agreed that a verdict should be entered for plaintiff, subject to the opinion of the Court, and a rule was taken on the following grounds :—

That the said verdict is against law and evidence, inasmuch as the plaintiff is not grantee.

That the plaintiff never entered into possession.

That the plaintiff is barred by the Statute of Limitations.

That the possession of Donald McDonald, the father of plaintiff, and the possession of John McDonald, the husband of defendant, and also of defendant, was adverse and precluded plaintiff from recovering herein.

The rule was argued March 31st, 1884, by *Meagher, Q. C.*, in support of rule, and *Borden, contra.*

RIGBY, J., (March 31st, 1884,) delivered judgment as follows :—

This was an action of ejectment to recover two lots of land at Schooner Pond, in Cape Breton County. The plaintiff's title consisted of two grants from the Crown, one in May, 1847, and the other in July, 1860, proved to include the lots described in the declaration. The plaintiff put his father on the place in 1843, who continued to live on it with some of his family until his death in 1878, the plaintiff contributing to their support. The plaintiff himself never resided on the property, and had no actual possession of it, unless it can be concluded from the evidence that his father occupied as his agent. The old man did a great deal of work on the place, and cleared a great part of the land within the boundaries of the lot granted in 1847. One of his sons, John, had his home with his father on this property ; he died in 1880, being 45 years of age, leaving infant children and a widow, whom he had married in 1876, who is the defendant in this action. There is no evidence that John had possession of any

part of the locus distinct from the old man ; and if any title was acquired as against the plaintiff, it would clearly be the title of the father. After the plaintiff's evidence was concluded at the trial, a verdict was entered by consent for plaintiff, subject to the opinion of the Court. I cannot see, upon the facts proved at the trial, what pretence there can be for disturbing this verdict. Assuming that it cannot be sustained on the theory that the father's possession was that of the plaintiff, and that the latter was, therefore, never out of possession ; yet, if the father had really acquired a title as against the plaintiff and died seized of the land in fee, then the plaintiff was entitled to recover upon his title as heir to his father. The only interest defendant had in the land would, in that event, be the right to have a divided third part of her husband's share assigned to her in right of dower, but she would have no estate in an undivided third part of the land ; *Cole on Ejectment*, p. 62. The case of *Ellis et al. v. Colonial Market Co.*, 3 R. & C., 196, determined that one tenant in common could recover, as in this case, without the verdict stating the proportion to which plaintiff was entitled, and without the co-tenants being joined as plaintiffs. Defendant's counsel contended that the plaintiff did not set up, at the trial, a title through his father. That, however, does not appear from the report. As soon as the plaintiff's evidence was completed the parties consented to a verdict, and it would be apparent to any lawyer that the plaintiff could, and probably would rely upon either title to support his verdict.

The rule for a new trial must be discharged with costs.

**BUTLER v. MERCHANTS' MARINE INSURANCE
COMPANY.**

Before McDONALD, C. J., and McDONALD, RIGBY, and THOMPSON, J J.

(Decided April 22nd, 1884.)

Marine Insurance.—Warranty.—Construction of policy.

AN application for a policy of insurance on a vessel contained the words, written on its face, "no other insurance," and the policy issued on the application so made contained the words, "warranted no other insurance."

Held, (McDONALD, C. J., dissenting,) that these words meant that there should be no other insurance on the vessel during the continuance of the risk.

This was an action upon a policy of insurance, in the usual form, upon the schooner *Smiling Waters*. The policy was issued on the 30th day of April, 1883, in favor of James Butler & Co., on account of whom it might concern. The declaration was in the usual form and averred interest in the persons composing the firm of James Butler & Co., and Henry Walfield, or some or one of them.

The following pleas were pleaded :—

1st. *Non est factum*.

2nd. Did not promise as alleged.

3rd. Not lost by the perils insured against.

4th. That at the time of loss there had been other insurance effected on said vessel which was then in force within the meaning of the warranty, "warranted no other insurance" contained in said policy.

5th. Misrepresentations by plaintiffs and their agents of material facts at the time defendants became insurers to plaintiffs, viz.: that no other insurance would be effected on said vessel during continuance of defendants' policy, whereas said vessel was afterwards insured by other parties for \$400 on behalf of said Henry Walfield, and which insurance was in force at the time of loss.

6th. That it was in and by said policy stipulated and warranted that there should be no other insurance on said vessel, and there was before and at the time of the alleged loss, further and other insurance effected on said vessel in addition to the sum insured by the said policy.

7th. Want of preliminary proofs.

8th and 9th. Denial of interest.

10th. To common counts: never indebted.

The cause was tried before RIGBY, J., without a jury.

Everything necessary to entitle the plaintiffs to recover the full amount insured was either proved or admitted, and the defence was rested solely on a warranty in the policy of no other insurance.

It was admitted that after the policy declared upon was issued, Henry Walfield, (one of the parties in whom interest was averred,) being indebted to Sperry for assistance in building the vessel, instructed him to effect insurance on the vessel to cover his debt, which Sperry did for \$400 with James Eisenhauer and others, on behalf of whom it might concern, both of which policies were in full force at the time of the loss alleged in the writ. The foregoing admissions were noted by the learned Judge upon the trial.

The application was also put in by defendant, subject to objection by plaintiffs' counsel, and it contained written on its face the words, "no other insurance."

The following judgment was given by Mr. Justice RIGBY:

I find all the issues in this case in favor of plaintiffs, except those raised by the sixth plea. I construe the warranty of "no other insurance" in the policy declared upon to mean that during the continuance of the risk there should be no other insurance on the vessel, and as it was in evidence that she was additionally insured, while that policy was in force, I find the issues raised by the sixth plea in favor of defendants. Judgment for defendants accordingly.

A rule *nisi* was granted to set aside the verdict or judgment on the grounds that it was contrary to law and evidence, and because the words contained in said policy, "warranted no other insurance," could only be construed to apply to a state of facts existing at the date of said policy or at the time the application therefor was made and not to the future, and the learned Judge erred in holding or construing said words to apply to or extend to the future. The rule to be made

absolute with costs, if the Court should be of opinion that the learned Judge erred in construing said warranty as he did, otherwise to be discharged with costs.

The warranty upon which the judgment of the learned Judge was based, was contained in the last clause of the policy and was as follows :—

“And so we the said Merchants’ Marine Insurance Company are contented and do hereby promise and bind the said capital and joint stock and funds of the said company to the assured, their executors, administrators, and assigns, for the due performance of the premises, the premium due to us for assurance being at and after the rate of four and one-half per cent. Warranted no other insurance.”

Meagher, Q. C., and *Drysdale*, in support of rule.—Warranties are never created by implication nor extended by construction. The rule is that if it is doubtful whether the words amount to a warranty or not, or if their meaning is obscure the Court will construe them most strongly against the company and in favor of the insured.

Ritchie, Q. C., contra.—The warranty extends to further insurance. Where the warranty was that a vessel was neutral, the Court construed it to mean that she not only was, but should continue to be neutral.

Meagher, Q. C., in reply.—The fact of a vessel, which is insured as neutral, becoming belligerent, changes the character of the risk, but the mere fact of other insurance being added, does not necessarily increase the risk. It has always been held that where a vessel is insured as neutral, she must continue such even where there is no warranty. That is a case of implied warranty, like seaworthiness.

MCDONALD, J., on the first day of the April Sittings, (April 22nd, 1884,) delivered judgment as follows :—

This cause was tried without a jury, before my brother RIGBY, who found all the issues in favor of the plaintiff, except that arising under the sixth plea, which is as follows: “That it was in and by said policy stipulated and warranted that there should be no other insurance on said vessel, and there

was, before and at the time of the alleged loss, further and other insurance effected on said vessel in addition to the sum insured by the said policy." The case states that a rule *nisi* was granted to set aside the verdict or judgment on the grounds that it was contrary to law and evidence, and because the words contained in said policy, "warranted no other insurance," could only be construed to apply to a state of facts existing at the date of said policy or at the time the application therefor was made and not to the future, and the learned Judge erred in holding or construing said words to apply to or extend to the future; the rule to be made absolute with costs, if the Court should be of opinion that the learned Judge erred in construing said warranty as he did, otherwise to be discharged with costs. The warranty upon which the judgment of the learned Judge was based, was contained in the last clause of the policy and was as follows:—

"And so we the said Merchants' Marine Insurance Company are contented and do hereby promise and bind the said capital and joint stock and funds of the said company to the assured, their executors, administrators, and assigns, for the due performance of the premises, the premium due to us for assurance being at and after the rate of four and one-half per cent. Warranted no other insurance."

It is admitted in the case that everything necessary to entitle the plaintiff to recover the full amount insured was either proved or admitted at the trial, and that the defence was rested, solely, on the warranty mentioned; and, thus, we are not troubled with any enquiry except as to the meaning of the words, "warranted no other insurance," as used under the admitted state of facts. It was admitted upon the trial that, after the policy declared upon was issued, Henry Walfield mentioned in the writ herein, being indebted to Sperry for assistance in building the vessel, instructed Sperry to effect insurance on the said vessel to cover his debt, which Sperry did for \$400 with James Eisenhauer and others on behalf of whom it might concern, both of which policies were in full force at the time of the loss alleged in the writ. The foregoing admissions were noted by the learned Judge upon the trial. The application was also put in by defendants,

subject to objection by plaintiffs' counsel, and it contained written on its face the words "no other insurance." For the purposes of this enquiry it may be conceded that the contention of the learned counsel for the plaintiffs is correct, that is to say that if there was any ambiguity in the terms of the warranty the plaintiff must recover, because it was the duty of the defendants to use apt words for their own protection; and, admitting that a warranty cannot be created by construction, I do not think that these questions arise here, because the words are so clear and unambiguous, in their ordinary sense and meaning, as to cover the period of the continuance of the risk then undertaken, whether the "other insurance" was effected before or after the issuing of the policy. The plaintiffs' contention is that they can only forfeit their rights under the policy if the "other insurance" had been made previous to its issuing, although operative but one day afterwards, and notwithstanding that the position of the parties could not, by reason of the prior policy, be affected in the slightest degree; and that they were at liberty to effect another insurance the moment they got their policy from the defendants, although the vessel may have been safe in port till the first insurance had ceased to be available, and though all the risks were things of the future. The argument cannot stop short of this, and, while I think the learned counsel is right in saying that if the other insurance was subsisting at the time the policy was issued the plaintiff could not succeed in this action, yet I fail to see anything in the words used to warrant us in limiting them to mean only insurances subsisting at the time the contract was made. No particular form of words is necessary to constitute an express warranty, nor any special words such as "warranty" or "warranted"; *Arnould on Ins.*, 544. "But the construction to be put on contracts and representations of this description will be regulated by the surrounding circumstances of each particular case, which must be regarded in order that the true meaning and intention of the parties may be discovered"; *Addison on Con.*, 502. The words, "warranted no other insurance," are more comprehensive to embrace the period of the risk than "warranted to sail with convoy," which literally are fulfilled

by sailing with convoy for but a short distance and then separating from it. But that warranty has been held to mean, 1, sailing with regular convoy appointed by Government; 2, from the place of rendezvous appointed by Government; 3, it must be a convoy for the voyage; 4, under proper sailing instructions, and 5, the vessel must depart with convoy and continue with it till the end of the voyage, unless separated by necessity; *Arnould*, 563. "The vessel, under a warranty to sail with convoy, must not only sail with convoy, but the captain must take standing orders to keep with the convoy, obeying signals and the like from the commander, unless unavoidably prevented"; *Phillips on Ins.*, p. 781. A provision in a policy that if notice of other insurance by the assured on the same subject is not given the policy shall be void applies to other subsequent as well as prior insurance; but if the subsequent assurance is void by reason of not giving notice of the prior insurance the latter will remain valid; *Phillips*, s. 864. The cause, *Blood v. Howard Fire Insurance Co.*, 12 Cush., 472, was cited for the plaintiff; but as I read it, it is an authority the other way, though such does not appear by the head-note, which reads thus:—"A statement in an application for insurance that the building is fastened up, and occupied only occasionally, for a particular purpose, if it be made a warranty by the terms of the policy, is only of the then existing situation, and is not a warranty that it shall so continue during the whole term of the risk; and a change in the occupation not increasing the risk will not, of itself, avoid the policy." The policy in that case contained a clause that "if the situation or circumstances affecting the risk shall be altered or changed by the agency of the insured so as to increase the risk, the policy shall be null and void unless confirmed by the company." This agreement was relied upon by BIGELOW, J., in his judgment, who says: "But it is clear that he did not rely upon it, (the warranty,) as there was an executory stipulation by which the plaintiff was to be bound after the contract was entered into. To guard against any increase of risk which might arise from any change in the structure or use of the property, they relied upon a special agreement designed for that purpose

only. If they relied on the warranty such an agreement was superfluous and useless. In order, therefore, to give effect to both clauses, it is necessary to construe the warranty as being affirmative only, and not intended to apply to the future condition of the property." So the words "warranted neutral" or "warranted neutral property," mean not only that the ship or property shall be neutral at the time the policy is effected, but, as far as depends on the conduct of the assured or his agents, they shall continue neutral, with a view of being protected on the voyage, and, consequently, that the ship shall be navigated according to the law of nations. This involves her being furnished with the documents or papers which are evidences of her neutrality and her observance of the regulations of those international treaties to which she is bound to conform; *Arnould on Insurance*, 564. And even without the word "warranted" or "warranted neutral," a representation that she is neutral property has, over and over again, been construed as a warranty. "A warranty that the goods or ship are neutral or neutral property, is an engagement on the part of the assured that it is owned by parties resident in a country at peace when the risk begins, and who have the commercial character of subjects of such country, and that it shall be accompanied with such documents and shall be so managed and conducted by the assured and their agents as to be entitled, as far as depends on them, to all the protection and privileges properly belonging to the subjects of such country"; *Phillips on Ins.*, sec. 783. This warranty is that the subject is neutral at the commencement of the risk, and that it shall continue to be neutral, so far as depends upon the assured or he is responsible; sec. 784. I refrain from citing further authorities, though they are numerous to the same effect, but may refer to *Jeffries v. Legandra*, 2 Salkeld, 443, in which it was held that a separation from the convoy, during the voyage, is only excused by the inability of the master to keep with it, after doing all in his power to do so. If the question now before us had been adjudicated by the eminent men who looked beyond the literal meaning of the few words ordinarily used in the two cases of warranty to sail with convoy, and of neutrality, to ascertain and declare

the true intention of the parties, I cannot believe that they would have adopted the opposite view, as we are asked to do in this case, that is to limit the literal meaning of the words used, which do not, in terms, refer more to the past or present than to the future, defeating, as I cannot help thinking would be the case, the only object and intention of the parties who used them, namely, to protect the defendants from the consequences of a change of risk during the whole period of its continuance, at the option of the assured, and without the knowledge or consent of the insurer. I am decidedly of opinion that the learned Judge who tried this cause correctly construed the words of the warranty, and that the rule *nisi* to set aside his verdict must be discharged with costs.

MCDONALD, C. J.—With great diffidence I am obliged to express my dissent from the judgment just read, which, however, is concurred in by the rest of the Court. The only cases cited by my learned brother are cases of convoy, in which the meaning of the words was self-evident from the connection in which they were used. I can find no way of arriving at the meaning which the parties using the words intended to apply to them and the words are sensible in either way. If the defendants selected imperfect words in which to express their meaning it appears to me that the doubt and the consequences of it should fall on them. Inasmuch as in my opinion there is no way of arriving at a conclusion, I do not think the defendants can ask us to construe the words in such a way as to enable them to avoid the responsibility which they were supposed to assume.

McMULLEN v. KENDRICK ET AL.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided April 22nd, 1884.)

Consent verdict.—License to use land.—Agreement for lease.—Riparian rights.

At the trial, after conflicting evidence, a verdict was taken by consent for defendants with power to the Court to set it aside and enter a non-suit or verdict the other way.

Held, that all questions of fact must be treated as settled in the proper way by the verdict.

A person in possession of land, under an oral agreement for a lease, has, against all others than the owner, the right to do all things which the owner could do to enable him to have the full enjoyment of the property.

Action for damages for the destruction of a mill-dam erected by plaintiff across the Barrington River, or Mill Stream, at Barrington, whereby plaintiff was deprived of the use thereof, and prevented from working or running his mill.

The defendants pleaded in justification that the dam in question wrongfully obstructed the flow of water from the Barrington River along a water-course leading to defendant's mill. They also justified as the agents of one Homer, the proprietor of the land, under whom they held possession under an oral agreement for a lease. The cause was tried at Shelburne, September 25th, 1883, before RIGBY, J., when it was agreed that a verdict should be entered for defendants, with leave to the plaintiff to move to set the same aside, the Court to have power to direct a verdict to be entered for plaintiff, or a judgment of non-suit to be entered. A rule was taken accordingly and was argued February 15th, 1884, by *Harrington, Q.C.*, in support of rule, and *McCoy, Q.C.*, contra.

THOMPSON, J., (April 22nd, 1884,) delivered judgment as follows :—

The action is brought for injury done by defendants to the plaintiff's rights, as a riparian proprietor on the Barrington River. For the purpose of keeping up the supply of water for his mill, on what is called the west stream, the plaintiff had dams in the east stream, where defendants' mill was, and one of these dams having the effect of turning the supply of water from defendants' mill, they caused it to be removed. This is the grievance complained of, and plaintiff depended on prescription for his right to keep up the dams in the east stream. There was a great deal of conflicting evidence on this point, but at the close of the trial plaintiff's counsel consented to a verdict for defendants, leave being given him to move to set the verdict aside and to enter a verdict the other way for \$8 damages, or to enter a non-suit. No question of law or fact was reserved, however, by the learned Judge who tried the cause, for the opinion of the Court, and he would have advised the jury to find for the defendants if the consent had not been given. I regard this as a consent that all questions of fact shall be treated as found properly

against the plaintiff. Mr. Harrington urged, against the verdict, that the dam was there with the assent of the proprietor of the soil on which it was constructed. There is nothing to support the theory of such assent, excepting that the proprietor, (Homer,) was not the person who removed the dam, but he had removed the dam which the previous proprietor of plaintiff's mill had put there, and he had probably little reason to complain of this dam, if defendants were satisfied to allow it to remain. He had, however, put the defendants in possession of this mill, under an oral agreement for a twenty years' lease, and when they found the dam an inconvenience they removed it, as they would undoubtedly have a right to do, even if Homer had expressly assented, (as he had not,) unless the plaintiff had acquired a right previously by prescription, which the verdict negatives. There was also a contention that the defendants' mill was not supplied by the natural course of the stream, but by an artificial cut. The weight of evidence would seem to be against this view, but if plaintiff relied on it he should have allowed that question to be put to the jury. As to the defendants' right to occupy this mill, and therefore to treat the obstruction to its enjoyment as a nuisance, it seems to me there can be no serious question. True, they had no lease until after the act complained of and after action, and the agreement for a lease, was, perhaps, not enforceable under the Statute of Frauds, but as to this the plaintiff had nothing to say. Homer could carry out his agreement if he pleased, notwithstanding the Statute of Frauds, and in the meantime the defendants were at least his tenants at will, entitled, as against strangers, to the full enjoyment of the property while the will of their landlord remained unchanged.

The rule *nisi* for a new trial must, therefore, in my opinion, be discharged.

RIGBY, J.—I am of the opinion that the weight of evidence is in favor of defendant, but independently of that, the learned counsel for plaintiff having agreed to a verdict against him, is in no better position than if the jury had found against him. All the issues being found against plaintiff, the verdict must stand.

THE QUEEN v. THE WARDEN AND TOWN COUNCIL
OF DARTMOUTH.

Before McDONALD, SMITH, JAMES, and WEATHERBE, J. J.

(Decided April 22nd, 1884.)

Demurrer to return allowed.

PRELIMINARY objection that by the practice of the Supreme Court of Nova Scotia there can be no demurrer to a writ of mandamus, overruled.

A writ of mandamus having issued directed to the Warden and Council of the Town of Dartmouth, commanding them to assess upon the property within the municipality or town, liable to assessment, the sum of fifteen thousand nine hundred and seventy-six dollars, and collect the same and pay it over to the Treasurer of the Municipality of the County of Halifax, or to show cause to the contrary, the Warden and Council made their return :

1. Claiming to be exempt from county school rates under the Act of Incorporation of the town, in which it was provided that the town should be set off into a separate school section, and should have the expenditure of all school rates raised within its limits for the schools of the town, as also of all government and school grants.

2. That the Warden and Council had no legal power or authority to assess the sum contained in the writ, the same having never been submitted to the rate-payers, or included in the estimates furnished at the annual meeting, as required by the provisions of the Act of Incorporation.

3. That the Council were prohibited from assessing the amount named in the writ as, under section 42 of the Act of Incorporation, it was provided that the sum to be voted for the estimates including ordinary and extraordinary expenses, should not exceed in any year the sum of \$15,000.

4. That the body of rate-payers having changed, it was impossible to assess the amount named in the writ on the persons who were rate-payers in the years for which it was claimed to be due.

5. That under the provisions of the County Incorporation Act, any difference arising between the Council of an incorporated town and the municipal council, as to matters of assessment, should be referred to arbitration.

The return having been demurred to on a number of grounds, the demurrer was argued January 17th, 1884.

Graham, Q. C., takes preliminary objection.—There is no such thing as a demurrer to a return under our practice. The regular proceeding would be by motion to quash, which is a distinct proceeding. These cannot be united in the same motion, but must be taken separately.

Ritchie, Q. C., in support of demurrer, cites *Tapping on Mandamus*, 375, 376. We attack the return in three methods, but if we are confined to one we will argue the *concilium* first. This was a proceeding on behalf of the Municipality of Halifax to compel the Town of Dartmouth to assess school rates. A rule *nisi* was taken for a mandamus to compel the assessment, which was made absolute after argument. An appeal was taken from this decision to Ottawa. The appeal was dismissed and the return was then made, which I am now attacking. In *17 U. C., Q. B.*, 545, there was a demurrer and motion to quash. Both were argued and decided together. It was held that the motion to quash was the proper form. (WEATHERBE, J.—You had better show that the return is bad. *Graham, Q. C.*—He must select his motion. WEATHERBE, J.—He can move on the *concilium*.) The return made is, (1,) that the defendants are not liable under the act; (2,) that they could not assess because the amount was not included in the estimates submitted to the town meeting; (3,) that the assessment in any one year is confined to \$15,000, and this exceeds it; (4,) that the rate-payers have changed; (5,) that there is another remedy. The return that we contend they should have made was to have assessed the money, or shown good reason for not having done so. A general return is not good, but the whole legal excuse must be set out *in extenso*; *Tapping on Mandamus*, 351, 352, 359. The defendants merely set up their own fault, that is, that the amount was not submitted to the rate-payers. Facts cannot be averred inconsistent with the original duty; *2 Q. B.*, 258; *10 A. & E.*, 531, 557, 561.

The first ground is bad because it does not show that the Town of Dartmouth is exempt from liability for school rates. The defendants' return is in the nature of a plea in confession and avoidance. It traverses no part of the writ. There are three ways of supporting schools, the government grant, the county rate, and the district assessment; *Revised Statutes*, chapter 32, sections 41, 51, 52, 54. The county rate, after being collected and paid into the treasury, goes back in amounts varying according to the number of pupils attending schools. This point has already been decided in *1 R. & G.*, 402. The second ground merely sets up the defendant's own negligence. They cannot take advantage of this. The town does not get rid of its obligation to assess county rates by not submitting them to the rate-payers. It is not made a condition precedent to the ordinary assessments that they shall be submitted, though it may be as to extraordinary assessments. The sum sought to be assessed is authorized by special enactment, and is not included in the amount for which the rate-payers had a right to assess. All the rate-payers had a right to pass upon was the extraordinary assessment, to meet which a by-law was required to be passed. Assuming that the rate-payers have changed, the property is still there. The *mandamus* requires the assessment to be made on the property. The change of rate-payers is no answer. The last ground is based on clause 19 of the County Incorporation Act, providing for arbitration. This was all settled on the argument of the rule *nisi* for the *mandamus*, and rule *nisi* to quash it; besides, the act has no application, as all the rates were due before the act went into operation; *Tapping on Mandamus*, pp. 18, 19; *High on Injunction*, section 387; *Dillon on Corporations*, 686, et seq. The Court will not allow a point which has been decided in the rule *nisi* to be again discussed; *Tapping*, 379.

Graham, Q. C., Henry, Q. C., and Russell, contra.—This is a demurrer, pure and simple. As the *concilium* is part of the demurrer, there is no *concilium per se*. There always was a *concilium* as part of a demurrer. It was moved for in order to get the demurrer argued. Prior to 6 and 7 Victoria, there was no such thing as a demurrer to a return, and conse-

quently there is no such thing known in our practice; *Archbold's Crown Practice*, 300. (*Ritchie, Q. C.*, cites *2 B. & Ad.*, 362.) Our statute abolishing the *concilium* only applies to ordinary civil writs, and not to mandamus, which is a *quasi* criminal proceeding. The expression "school rates" in sec. 36 of the Incorporation Act, is a general phrase not confined to school assessments, but covers all rates raised for the support of schools. If the county can raise money, the town alone has the expenditure of it. The section prohibits the raising of any other tax for the support of schools. *Incorporation Act*, sections 36, 37. The meaning is that in reference to outlying sections not forming part of the town, the town collects the rates and supports schools. If the town was to collect the 30 cents per head in the outlying districts, the county might as well have collected it. Anything inconsistent with the Incorporation Act is repealed; *Acts of 1877*, chapter 40, section 31. We are not precluded from taking any grounds by anything said in previous decisions. The whole matter is open to us as much as it would be on a writ of *certiorari* to bring up a conviction after writ allowed, when the Court may either affirm the conviction or quash it. On the construction of Chapter 37, *Revised Statutes*, section 52, "Of Public Instruction," the term county does not include municipalities which are for the purposes of the act counties by themselves. See also *Section 58*. There have been changes in the inhabitants of the town, and the Court will not enforce against the present rate-payers assessments due by previous rate-payers; *20 U. C. C. P.*, 49; *5 A. & E.*, 10 *2 M. & W.*, 777. The principle of the law is against what is called a retrospective rate, it being, where the inhabitants are changing, an unjust rate. It is an excuse for not obeying a writ that it requires an illegal thing to be performed. For ordinary and extraordinary expenditure we cannot exceed \$15,000, and this exceeds that amount. The rate-payers may affirm both ordinary and extraordinary expenditure. The Court will not order a mandamus to enforce an illegal rate. The rate would be illegal if it exceeds the amount, and if it is not submitted to the town meeting. If a remedy is necessary, it must be against the persons by whom

the rate should have been submitted. If there is another remedy, mandamus will not lie. Acts of 1877, chapter 40, section 2, enables the town to sue and be sued. Acts of 1879, chapter 1, section 90, provides for the arbitration. All points taken on the motion to quash the writ are open now; *High*, sec. 493. The writ is directed to the wrong officers. The writ was not issued in term but in vacation. There is no test to the writ.

Ritchie, Q. C., was not called upon in reply.

SMITH, J., (April 22nd, 1884,) delivered the judgment of the Court as follows:—

On the 22nd March, 1880, a judgment of this Court was delivered on an application to make a rule *nisi* absolute for a mandamus requiring the Warden and Council of the Municipality of Dartmouth to assess on the property of the town, liable to assessment, the sum of \$15,976, for its proportion of school rates during the years 1873, 1874, 1875, 1876 and 1877, by which judgment it was decided that on the true construction of the Education Act the Town Council were liable to pay such rates and should have assessed the town for that purpose, but the final determination with reference to the issuing of the mandamus was suspended, as expressed by the then Chief Justice, in order that the Legislature might intervene, and, on application made to this Court, the rule *nisi* granted in February, 1879, after argument and hearing affidavits read, was, on the 5th April, 1881, made absolute and a writ of mandamus ordered to be issued. From this decision an appeal was taken to the Supreme Court of Canada, which Court, after argument, on the 28th day of April, 1882, adjudged that the appeal should be dismissed. A mandamus was accordingly issued, after argument, directed to the Warden and Council of the Town of Dartmouth, commanding them forthwith to assess upon the property within the Town of Dartmouth, liable to assessment, the sum already referred to, and to pay it over to the Treasurer of the Municipality of the County of Halifax; and they were required to make a return to said writ which, after an unsuccessful application to this Court to set the writ aside, in which most of the questions now raised were disposed of, (see rule *nisi* and rule

absolute, and opinion of the Court delivered by WEATHERBE, J.,) they did on the 20th July, 1883. To this return the said Municipality of Halifax, by J. N. Ritchie, Q. C., their attorney, say that "the said return is not sufficient in law, and that the said municipality show to the Court several causes of demurrer to the said return." Before dealing with, or rather referring to, the twelve different grounds of the demurrer, so called, we must consider the preliminary objection taken by Mr. Graham, that there is no such thing as a demurrer to a return to a mandamus in this country. As this is a prerogative writ, having developed itself into its present generic character, as *Tapping* says in his work on the subject, "during centuries of judicial nurture," it has been but seldom resorted to in this country, and we have nothing in our practice to guide us to any definite conclusion as to its various phases of procedure in detail. We are therefore driven to the practice of the English courts. The English practice, as I find it laid down in *Tapping on Mandamus*, 372, is as follows:—"The legal formulæ by which a defective return may be invalidated are two—"the one by motion to quash, which is resorted to when the return is vicious by reason of any clear and well-acknowledged defect; the other by demurrer, which is applicable where the return is insufficient for defects which are not so apparent to the court but require the invalidity of the return to be tested by solemn argument. The proceeding by demurrer has, by a comparatively late statute, been substituted for that by a *concilium*, which in effect was exactly the same." We think this objection cannot prevail, as we think that the mere calling the exceptions to the return a demurrer an objection of the most technical character, and the demurrer appearing to be recognized by authority as of the same nature as a *concilium*, resorted to in England for some purposes connected with the procedure of the writ of mandamus. In regard to the sufficiency of the return, we are of opinion that the decision already given and reported in *Russell & Chesley*, taken in conjunction with that of the Supreme Court of Canada, must conclude us and requires our decision to be against the sufficiency of the return, and that the Municipality of Halifax have judgment herein.

JAMES, J., delivered the following dissenting opinion:—

I do not intend to advert in my opinion to any matters which are merely technical. I understand the principal and substantial question to be whether the Warden and Council of the Town of Dartmouth have, in their return, given good and sufficient reasons for not doing that which they were commanded to do by the writ of mandamus. The question is brought before us in three different ways, but the main question, running through the whole proceeding, is that which I have stated, and because I consider the return sufficient in law, I cannot sustain the demurrer. My reasons for thinking as I do I have already given in my judgment on the rule for a mandamus, which is reported in *1 R. & G.*, pp. 417 to 427. I continue of the same opinion there expressed, namely, that the City of Halifax is not exempt from the county tax for schools, because it is not so enacted in clear and express terms, and because the effect of the act is, if the city be exempt, to impose on Dartmouth a tax of four dollars per family, annually, more than the town would have been called upon to pay had the city not been exempted. This I have demonstrated in that opinion upon data furnished by affidavit in the cause, which have not, nor have my conclusions upon them, been controverted. The injustice is as plain as if the act had said, "The share of county taxation due under this act from the City of Halifax shall be paid by the Town of Dartmouth." I do not wish to repeat the argument in that opinion, which is reported, but since the decision of that case by the Supreme Court of Nova Scotia, a case has been decided by the Privy Council, the *Annapolis Railway Company v. The W. C. R. Co.*, and the judgment of the Court is before me. The statute of the Dominion took away the title and possession of a railway from one company and gave it to another without compensation. This was clear; and that court held that in reading such a statute a canon of construction is applicable, different from that prevailing in ordinary circumstances. The judgment says:—

"Neither in the Act, 37 Vic., chap. 16, nor in the schedules appended to it, is mention made of the agreement of 22nd September, 1871, nor indeed of any right or interest of the

respondent company in the Windsor Branch Railway. The canon of construction applicable to such a statute is that it must not be deemed to take away or extinguish the right of the respondent company, unless it appear, by express words or by plain implication that it was the intention of the Legislature to do so. That principle was affirmed in *Barrington's Case*, (8 Coke, 148a,) and was recognized in the recent case of *The River Wear Commissioners v. Adamson*, (L. R., 2, H. L., App., 743.) The enunciation of the principle is, no doubt, much easier than its application. Thus far, however, the law appears to be plain, that, in order to take away the right, it is not sufficient to show that the thing sanctioned by the act, if done, will of sheer physical necessity, put an end to the right; it must also be shown that the Legislature have authorized the thing to be done at all events, and irrespective of its possible interference with existing rights.

"It appears to their Lordships that there is nothing in the provisions of the Dominion Act, 37 Vic., chap. 16, to warrant the inference that the Parliament of Canada must have intended thereby to enact that immediate possession of the Windsor Branch, for the purpose of working it, was to be given to the appellant company, under the agreements scheduled, even though there shall be a subsisting arrangement for the working of the line. Indeed the contrary appears from the 2nd section of the act, to which reference will be made hereafter."

The Legislature have not exempted the City of Halifax by "express words," or by "plain implication," or "irrespective of its possible interference with existing rights," because they have not exempted or pretended to exempt the city in any way, nor will any language in the act bear that construction. Neither in the Education Act, R. S., chap. 32, sec. 88, nor in any other part of the chapter, nor in any other legislation is there one word expressly or by necessary implication exempting the City of Halifax from the County tax. Section 88 enacts that "on request of the Board of Commissioners, specifying the amount required in addition to the sums provided from the public treasury for the yearly support and maintenance of the schools under their charge, the Council

shall be authorized * * * to add a sufficient sum * * * to yield the amount so specified by the board to the general assessment of the city." This is the whole. There is not another word of legislation anywhere, unless it be in sec. 52, to repeal or make any exception to the general law. The fair and ordinary construction of the act, leaving out equitable considerations, is that the City of Halifax, with the aid of the Provincial grant, shall maintain her own schools, and also pay into the county fund for the poor districts outside. But it is argued that this is controlled by the language of sec. 52, which enacts that "the Clerk of the Peace in each county, except as hereinafter provided in relation to the City of Halifax, shall add to the sum annually voted for general county purposes at the General Sessions, a sum sufficient to yield thirty cents per head, to be added to and form part of the county rates." This fund is to aid the poorer sections of the county at the expense of the more populous and wealthy. Now, if the City of Halifax is to escape this tax, it is in virtue solely of section 52, and not of section 88, which makes no such exception. What is the meaning of the exception? Surely it means that if it was to be an exception at all it was to be an exception provided for in a subsequent part of the act, and if no such exception was provided in a subsequent part of the act, the "exception" falls to the ground. So far from that being the case, there is no reference whatever in section 88 or any other section, to any exception of the City of Halifax from the general policy of the law in this respect, and therefore no such exception having been subsequently made, the general policy of the law prevails. The Legislature probably had it under consideration whether or not to exempt the city from a burthen fixed by the statute upon every other part of the Province, but, when they came to section 88, they reasoned that of all towns in the Province, the City of Halifax, which has six times the population and ten times the wealth of any other town in Nova Scotia, and which is, above all other towns, dependent for her wealth and population upon the poor, scattered, outlying settlements along a seacoast of a county of over a hundred miles, unable, to support their schools adequately without the assistance

of the city, whose profitable West India trade is largely sustained from the produce of their fishery, should be the last to ask such an exemption. It is probable also, that the Legislature saw that the effect of such legislation would be to double the taxation of the Town of Dartmouth, the only other town in the county, and therefore, refrained from inserting in section 88 the exemption which they had had under contemplation, and came to the much more rational and just conclusion not only not to exempt the city from this county tax, but to take away her right to participate in the county fund, which would have been only just and reasonable under the circumstances, leaving her to rely on her sectional taxation and such additional help as she might obtain from the public Provincial grant, or from a special grant by the Legislature. I might, although I do not, admit that upon a careful sifting of the language of the statute and applying to it the ordinary rules of construction, it would appear that my reasoning as to the actual intention of the Legislature could not be sustained. But this is not a case for the ordinary rules of construction to apply, because it unjustly, if my construction of the statute is erroneous, takes from one town in order to unjustly relieve another, a double injustice, an injustice to the whole county. Surely, in such a case, I am entitled to say that by omitting to make the exception which section 52 would seem to have intended, the City of Halifax, by the literal construction of the act, is not, beyond all question, exempt from this burthen, and if not exempt she cannot succeed in this litigation. Again, the exception referred to in section 52 as being intended, may have been of a different nature altogether. It may have been intended that in Halifax these proceedings were to take place semi-annually or biennially, or the city may have been intended to be released of one-half of the tax, or to pay a double portion. We don't know what the exception would have been had it been made, but it was not made. I held in my former judgment that the Town of Dartmouth was not exempt by the act from this tax. Very probably I was in error, and the forcible, certainly very forcible, arguments of counsel in favor of that exemption should have prevailed with me. But I have no hesitation

whatever in deciding now, after having again given the subject that great force which ought to be allowed to the consideration that these two statutes, being *in pari materia*, should receive as far as possible the same construction. We are to construe them as parts of one and the same statute, *i. e.*, the General Education Act for the Province and as if they were enacted together and in relation to each other and at the same moment of time. This is a sound and recognized canon of construction. Now it is inconceivable that if it was the intention of the Legislature to exempt the City of Halifax they would have deliberately refused to exempt Dartmouth also, when the result would be to relieve the large and wealthy city not only from a public burthen on every other part of the Province, but at the expense of the small and poor town in her suburbs. And if we read the two acts together, as different parts of one statute, we will see much more clearly the force of my contention that it was the intention of the Legislature, in omitting to assert the exemption indicated in section 52, to leave the city subject to the general policy of the act. In the earlier stages of this litigation the county was advised by the Court to go the Legislature to get power to assess Dartmouth for the amount alleged and by the majority of the Court held to be due. Why have they not done so? The reason was avowed by the county's counsel to the Court on a former argument. It was because the Legislature would not entertain such an application. They would be far more likely to legislate the other way, and the counsel for the city know it, and therefore they have not accepted the recommendation of the Court. They dare not go to the Legislature.

I remain of opinion that the city is not exempt, (1) on the principle of the decision of the Privy Council above cited, which was given in a case very far weaker than this, against the literal construction of the statute; and (2) that reading the two statutes together, either both towns are liable to or both exempt from the tax; and (3) and mainly, because by a literal construction of the Education Act the City of Halifax is not exempt.

ROYAL CANADIAN INS. COMPANY v. SMITH.

Before McDONALD, WEATHERS, RIGBY and THOMPSON, J J.

(Decided April 23rd, 1884.)

*Marine Insurance.—Concealment.—Knowledge of defendants before issuing policy.—
Explanation of minutes by Judge.*

When plaintiffs applied through their agent for insurance on goods the defendant was unaware of a disaster to the ship, known to the plaintiffs but not to the agent who made the application. Before the policy issued defendant became aware of the disaster to the ship and the Judge at *nisi prius* found, chiefly upon the defendant's own admission that he did not issue the policy because of his supposed obligation under the ship, but elected to take the risk notwithstanding the disaster of which he had become aware.

Held, WEATHERS, J. dissenting, that the plaintiff could recover, notwithstanding the concealment at the time of the application.

Held, that the Court *in banc* could receive the explanation of the Judge as to the nature of the question to which a statement of defendant on the minutes of evidence was an answer.

This was an action on a policy of re-insurance on cargo shipped on board the steamer *Waldensian* on a voyage from Montreal to Glasgow. The only material pleas were as follows :—

Seventh plea.—And for a seventh plea to said first and second counts defendant says that at the time of the defendant subscribing the said policy, the plaintiffs and their agents wrongfully concealed from the defendant a fact well known to the plaintiffs and their agents, and unknown to the defendant, and material to be known to the defendant and material to the risk of the said policy, to wit: That the said ship, after leaving on said voyage, had been reported as having arrived at Quebec on the eleventh day of August, A. D., 1880, with water in her forehold, and that she had been put on a bank there to prevent further damage.

Eighth plea.—And for an eighth plea to the first and second counts said defendant says that at the time of the defendant subscribing said policy and becoming such insurer as alleged plaintiffs and their agents wrongfully concealed from the defendant a fact then known to the plaintiffs and their agents and unknown to the defendant, and material to be known to the defendant and material to the risk of the said policy, that is to say, that the said ship had, after she left

Montreal on said voyage, got on shore in the River St. Lawrence and had arrived at Quebec leaky and been beached there in consequence.

Plaintiff joined issue on all the pleas, and, on the seventh and eighth, replied as follows:—

Seventh replication.—And for a seventh replication to the seventh and eighth pleas, which plaintiffs suggest set up the same ground of defence and not other or different, plaintiffs say that the defendant, after he became aware of and knew the facts and circumstances alleged in said pleas, took, accepted and received from the plaintiffs the premium for said risk and issued and delivered said policy to the plaintiffs whereby and by reason and means whereof the defendant elected to accept and adopt and did accept and adopt said risk and confirmed the agreement theretofore made between plaintiffs and defendant for said risk, and was and is and of right ought to be thereby estopped from pleading or setting up the grounds of defence alleged in said pleas.

Eighth replication.—And for an eighth replication to said seventh and eighth pleas, plaintiffs, first suggesting as aforesaid, say, that after they made application to the defendant for said insurance and before the issuing and delivery of said policy by defendant, and before defendant agreed to accept said risk, the defendant knew all the facts and circumstances alleged in said pleas, and, with full knowledge thereof, accepted said risk and issued said policy.

The cause was tried at Halifax, November 7th, 1883, before RIGBY, J., without a jury, who gave judgment as follows:—

“I find that when the insurance in question was applied for and the contract therefor completed, but before the issue of the policy, the plaintiffs were aware of the facts stated in the seventh and eighth pleas, and that said facts were material to the risk and were then unknown to the defendants, from whom they were concealed by the plaintiffs; that before the policy was issued or the premium paid the defendants also became aware of said facts and subsequently issued and delivered the policy to the plaintiffs, accepted payment of the

premium and elected to continue to treat the contract as binding. The issues raised by the other pleas I find in favor of the plaintiffs.

Judgment for plaintiffs for \$23.01 with interest from date of writ."

Ritchie, Q. C., in support of rule.—The Judge has found that the plaintiffs concealed the fact of the vessel having run ashore at the time of the application for the insurance, but that the defendants knew of the disaster at the time they issued the policy and accepted the premium. If a vessel was represented to be five years old when she was in fact twenty years old, and the risk was accepted on this representation, but the insurers became aware of the fact before the policy was issued, and the vessel sailed on the voyage and was lost, the insured could recover, because, if the objection had been raised before the issue of the policy, they might have insured elsewhere. In the present case the plaintiffs could not have re-insured because the loss had occurred and was known before the policy was issued. (RIGBY, J.—The evidence was not that when the insurers delivered the policy they did so because they considered themselves bound, but that they did not know of any goods being damaged.) The insurance would not be affected by anything happening between the giving of the slip and the issuing of the policy because the slip is the insurance; *L. R.*, 7 *Q. B.*, 304; *L. R.*, 8 *Exch.* pp. 40, 197. There is no evidence of when the policy was executed. It may have been on the same day as the slip. There is no evidence of when the premium was settled. The fact that demur was made to the delivery of the policy shows that there was no waiver. (WEATHERBE, J.—All the merits are with the plaintiff.) No, because they obtained insurance on the vessel knowing her to be on shore. (WEATHERBE, J.—Both parties knew the same thing.) The defendants did not know it when they initialled the slip. The delivery of the policy cannot make any difference, because if the policy was issued on the day the slip was signed, it was complete, although it remained in the hands of the company; *L. R.*, 2 *H. of L.*, 296. The policy, in the absence of evidence to the contrary, must be assumed to have been issued on the day it

bears date. There is no proof that the plaintiffs were prejudicially affected by our taking the money. If they do not suffer any damage no estoppel can arise. It would be evidence of prejudice if the plaintiff showed that they were prevented from insuring elsewhere.

Meagher, Q. C., contra, was not called on.

THOMPSON, J., (April 22nd, 1884,) delivered judgment as follows:—

I have come to the conclusion that the rule *nisi* for a new trial should be discharged. Plaintiffs on 13th August, 1880, made application to defendant for insurance of \$3,500 on the S. S. *Waldensian* "at and from Montreal to Glasgow via port or ports." The steamship had left Montreal on the 11th, and, on the afternoon of the same day had got on shore. She got off again and proceeded to Quebec, where she arrived that evening, leaking badly, and she was there stranded to prevent further damage to cargo. The loss sued for was caused by the first stranding. On the following day, being the day before the application, the plaintiff company knew of the accident to the steamer. They did not inform their agent in Halifax of it, and he, being ignorant of it, made the application. Defendant, not knowing it, acceded to the application. On the day following, however, the defendant knew of the disaster, and seventeen days after that, he issued the policy, and subsequently accepted credit for the premium. The learned Judge who tried the cause naturally had his attention turned to the all-important question: did the defendant, in issuing the policy and accepting the premium, elect to go on with the contract and make the insurance, notwithstanding the material facts which had been concealed on the application, or did he issue the policy because he felt bound to do so after having accepted the slip. He found that the defendant did so elect and on this question of fact he was abundantly justified in so finding by facts which were not in dispute, viz.: by the absence of any protest at the time of the issuing of the policy or before, by the lapse of time which intervened between the knowledge of the disaster and the delivery of the policy, by accepting credit for the premium without objection,

and without its appearing to have been accepted through anything like inadvertence, but, more than all, by the avowal of the defendant. When asked why he gave the policy, instead of asserting that which his counsel would have us suppose now, viz., that he gave it because he supposed he was bound to do so after having agreed to the application, the defendant said that he gave it because, while knowing of the steamer's disaster, he did not know that the goods, (the insurance being on cargo,) had been damaged. This piece of evidence appears thus on the minutes:—"When we delivered the policy we knew of the disaster to the steamer, but did not know that any goods had been damaged." But the learned Judge who tried the cause, and who was with us at the argument, explained that this was given in answer to a question such as I have stated above. I think we can receive that explanation, as the explanation of Lord Chief Justice COLERIDGE was received in *Chatterton v. Cave*, 3 App. Cases, 483, and it gives much additional importance to the piece of evidence quoted. I think the evidence was almost conclusive as to the defendant having elected to treat the contract as binding, and the learned Judge so viewed it when he found the issue as he did. This distinguishes the case in a vital particular from that of *Morrison v. The Universal Marine Insurance Company*, L. R. 8 Ex., 197. This piece of evidence seems also to meet the point which Mr. Ritchie took after the close of the argument, and which, but for it, might otherwise have had much force, viz., that there was no evidence that the defendant knew of the concealment, although he knew of the disaster, when he issued the policy. If he issued the policy, when he did, because he disregarded the disaster, not knowing that that disaster had affected the goods which he was insuring, and being willing to run the risk of that, as we must conclude from his evidence, his counsel cannot successfully contend that he is not bound by his election or did not really make any election because he was unaware that the plaintiffs in making the application had known and concealed a circumstance which, when it was revealed to him, he considered as not sufficiently important to induce him to refrain from taking the risk. At the time of the election

there was no concealment and in view of the election the previous concealment was unimportant. It seems probable that the statement which the defendant so made in evidence was an incautious one, and more favorable to the plaintiff than the strict truth required, but we cannot disregard it, or get rid, by any refinement, of it or of the finding of the Judge based on it, even for the purpose of defeating the plaintiffs in a claim in respect of which their conduct was such as not to commend them to our consideration, because they should have made their agent aware of the important fact which had come to their knowledge while the negotiations were pending, as was stated to be proper in *Cory v. Patton*, L. R., 7 Q. B., at page, 308. The position then of the case is this: There was no concealment of the condition of the ship at the time of delivering the policy,—that fact was then equally known to both parties. The defendant would still be relieved from liability if, as a matter of fact, he delivered the policy merely in consequence of having accepted the slip, and without knowing that, when he accepted the slip, the plaintiffs knew, and had concealed from him the facts of the disaster. But, he says, and the Judge finds, that he did not deliver the policy in consequence of his obligation under the slip, but because he was still willing to take the risk—not knowing that the goods were damaged. As he decided to go on and insure, irrespective of the slip, we cannot relieve him from his contract to do so merely on the ground that the slip contract did not bind him to do so in consequence of a concealment which did not exist when the policy was delivered. According to his own evidence, in making the policy, he acted as if there had been no slip, and the contract was to depend on the policy, but against the policy he cannot urge concealment because he then knew all the plaintiff knew.

RIGBY, J.—At the trial of this cause I had no hesitation in arriving at the conclusion that all that plaintiff knew of the injury to the *Waldensian* was known to defendant's company when the policy declared upon was delivered. The issue that gave me difficulty was raised by the eighth replication, which I would, however, have found in favor of the defendant if it

were not for his own testimony. In cross-examination he was asked if the company knew of the disaster to the steamer when the policy was delivered, to which he replied in the affirmative. He was then asked why, possessing such knowledge, they nevertheless delivered the policy, and his answer was, because they did not know that any goods were damaged. It was this admission that led me to find that the defendant elected to treat the policy as binding. I certainly thought it singular that an insurance company, knowing that a vessel carrying the insured cargo had sustained such injury as the *Waldensian* was known to have received, would voluntarily continue the risk, but the defendant's testimony to the contrary overruled this opinion as far as this company was concerned. I cannot yet see that my decision should have been otherwise. I assume that defendant truthfully stated the reason why the policy was delivered by his company, after they knew of the disaster to the steamer, and the statement was in effect a declaration that if the facts known to the plaintiff had been communicated to the defendant when the insurance was applied for the risk would nevertheless have been taken at the premium agreed upon.

WEATHERBE, J.—The facts are brief and undisputed. Cargo having been insured with plaintiff company in Montreal to cross the Atlantic, the ship, after leaving that port, met with disaster coming down the St. Lawrence river. Plaintiff, on becoming aware of this effected re-insurance with the defendant in Halifax, through their agent by telegraphic message, concealing their knowledge of the disaster from defendant who was in entire ignorance of it from any source. To the ordinary declaration on the policy defendant pleaded that plaintiffs at the time of making the contract wrongfully concealed facts material to the risk. To this plaintiffs replied that after defendant became aware of the circumstances alleged in said pleas he received the premium and delivered the policy and thereby elected to accept the risk. The circumstances referred to, of course, constituted the fraudulent concealment. That concealment of material facts was properly found by the learned Judge for defendant, but, having come

to the conclusion that defendant, who had, after the risk was accepted, heard of an accident to the ship, although he never at any time heard of the concealment of facts, by issuing the policy had elected to continue the contract, he gave the judgment for plaintiff which is now under review. That judgment necessarily involves the determining of the issue raised by the replication for plaintiff, viz., that defendant became aware of the concealment or fraud before the delivery of the policy. That which constitutes what I, with deference, deem the fallacy here arises from confounding the facts of the injury to the ship with the circumstances of the wrongful concealment of these facts. No argument is required to show that if the knowledge of the disaster to the ship only had been pleaded in the replication it would have been demurrable; and the defence of a wrongful concealment would have been unanswered. Nothing, I should have said, could be clearer than the necessity, where such a concealment is set up, to get rid of it by waiver or election in adopting the contract afterwards, to plead a knowledge of the concealment. The defendant, without knowledge of the loss, accepts the risk. He learns afterwards that the loss had taken place at the time of accepting the risk. This will not excuse him from delivering the policy, nor is it any answer to the claim for loss. Assuming that defendant, Smith, before taking the premium and delivering the policy, had accepted the contract, as is proved, how could the settlement of premiums and delivery of the policy show he elected to continue it. There is no election in the case at all. I am not able to understand how that enters into the discussion. It is an every day occurrence that a loss takes place before application is made for insurance. The underwriter is equally liable as where the loss takes place afterwards. He delivers the policy in furtherance of the contract. It would be a violation of his obligation to refuse. Then that is not electing one way or the other. When the slip is issued the contract is made. Any concealment of material fact puts it into the underwriters power to repudiate the contract. But he may, with a full knowledge of that fraudulent concealment, elect to continue it—or rather, as the law regards it, elect not to

avoid it. If he delivers a policy with a view to carry out the contract, without the knowledge that anything was withheld, he is unquestionably not to be estopped by that act, and it is clear that he never can be bound under any circumstances short of disclosure of the fraud and waiver or election by him with full knowledge of everything. It is not pretended here that the defendant, Smith, ever heard of the concealment at all. He heard of the accident to the ship, and it may be he heard there was water in the hold—though that does not appear—and, having agreed previously to accept the risk, he, as a matter of course—as every honest underwriter should do—delivered the policy. Before pleading to the action on that policy he discovered that plaintiffs had been aware of the loss when they applied for the policy, and concealed their knowledge, and on the trial he clearly proves this concealment which is a complete defence to the action. It is true plaintiffs had put upon the record an answer to this defence which, if proved, (unless imperfectly stated) would have entitled them to recover, namely, that after knowledge of the circumstances pleaded,—the concealment,—the defendant elected to affirm and continue the contract, but there was no evidence of it whatever, and plaintiffs, therefore, should not be permitted to recover unless in some way not discussed and which has not occurred to me. The case of *Morrison v. The Universal Marine Insurance Co.*, L. R., 8 Ex. 40, 197, cited at the trial and argument, and the contention raised upon that case, was, I think, beside the question really to be determined here, and the real point of this case was not brought to the notice of the court. There, although there had been concealment of telegraphic messages, which disclosed disaster to the ship, by the agent effecting the insurance, he disclosed all the sources of his knowledge and the fact that he had read the messages which had been concealed previous to the delivery of the policy. That is not the case before us. And yet, even there, it may be mentioned, the court sustained the direction of the Judge who told the jury that he attached no weight to the handing out of the stamped policy. It seems to be the essence of that case that settlement of the premium and delivery of policy, even after disclosure of material facts,

which had been concealed at the making of the contract, and with the knowledge that they had been at the time known to the insured,—even this is insufficient to show an election on the part of the underwriter not to avoid the contract already made. Even after all this the underwriter may go on and yet he will not necessarily be rendered liable. It is true that before the tribunal which decided this no questions of fact could be reviewed. In Morrison's case the impression was that the report of the disaster in question there referred to a different vessel from that sought to be insured, and both parties, it would seem, were satisfied of that after the disclosure. But here, if the concealment itself had been disclosed we would have had a desperate risk which it would seem monstrous to suppose that any underwriter could have taken.

The verdict, for the reason mentioned, should be set aside.

LAYTON ET AL. v. SMITH ET AL.

Before McDONALD, C. J., and McDONALD, SMITH, WEATHERS, and THOMPSON, J J.

(Decided April 22nd, 1864.)

Principal and agent.—Undisclosed principal.—Right to sue.—Sale.—Misrepresentation.—Estoppel.

PLAINTIFFS who held a bill of sale on a quantity of lumber authorized its sale by M. & L. and assented to a sale to the defendants, to whom they represented M. & L. as owners. After the sale and part payment of the purchase money plaintiffs disclosed themselves as owners and demanded the balance due, which defendants, notwithstanding, paid to M. & L.

Held, reversing the judgment of the County Court Judge, that plaintiffs were entitled to recover as the real principals in the transaction, and were not estopped by the representation.

WEATHERS, J. dissented on the ground that M. & L. were not shown to have acted as agents of plaintiffs.

Appeal from a decision of the learned County Court Judge for District No. 5. The action was on the common counts for money had and received, &c. Plaintiffs permitted Moore & Lewis to sell to defendants certain timber of which plaintiffs held a bill of sale. Defendants, treating Moore & Lewis as the owners of the timber, paid them \$100 on account of it. Plaintiffs then gave notice to defendants to pay no more to

Moore & Lewis, but, subsequently to the notice, defendants paid Moore & Lewis the balance due. The judgment appealed from was in favor of defendants. The appeal was argued in the first instance before a division court composed of WEATHERBE, RIGBY, and THOMPSON, J J., who gave judgment sustaining the appeal, WEATHERBE, J., dissenting, but, in consequence of division of opinion, the cause was re-argued before the full court, constituted as above, by *Townshend, Q. C.*, and *Borden*, in support of appeal, and *Meagher, Q. C.*, contra.

MCDONALD, J., (April 22nd, 1884,) delivered judgment as follows:—

The plaintiffs, without doubt, were the legal owners of the logs in question, but, according to the finding of the learned Judge of the County Court, they represented them to the defendants as the property of Lewis & Moore. Acting upon this representation, as we must assume, after the learned Judge has so found upon the facts, the defendants purchased the logs from Lewis & Moore and paid part of the price to the latter. After this the plaintiffs disclosed themselves as the real owners of the property, and, in the capacity of disclosed principals, demanded the balance due under the purchase; and the question now is how far they are estopped from telling the truth. It is quite clear that they are estopped from disputing the ownership of the logs, and setting up the truth as to that; but are they estopped from setting up their claim, not to the property, but to the proceeds of the sale remaining unpaid after they made their claim and gave notice to the defendants? They made no misrepresentation, at the time of the sale or afterwards, touching their right to disclose themselves as principals and collect the price, and I think that the law applicable to this case was correctly laid down by ERLE J., in *Howard v. Hudson*, 2 El. & B., 1, and that we may here repeat his words with perfect confidence that they are right and applicable. "Did the defendant make a misrepresentation to the plaintiff with intent that the plaintiff should act upon it, and did the plaintiff in consequence so act upon it to his prejudice?" The evidence in this case does not appear to me to show such an estoppel. The

party sought to be estoppel may tell the truth at any time and resume his true position in the matter in controversy, except in so far as his wilful misrepresentation, whether by words or conduct, has been acted upon by the opposite party and to the opposite party's prejudice; *Dunstan v. Patterson*, 2 C. B., N. S., 500. It is not here claimed that there is no estoppel as to the right of property in the logs, or to the plaintiff's right to that part of the price which was paid before the principal disclosed himself and told the truth, and although the representation made induced the defendants to purchase the property, not from the plaintiff, but from Lewis & Moore and to that extent, and that only they may have changed their position, yet I fail to see any evidence to show the other essential element, namely, that, as to the amount now claimed, they were induced to change their position to their prejudice, and I do not think that, without showing such prejudice, an estoppel can be maintained. There are cases in the books in which change of position, merely, is mentioned; but I suppose the meaning is that the change, to be an estoppel, must be prejudicial to the party seeking to estop the other. If the change were beneficial it would not, I think, be an estoppel. In this case there was no liability on the part of the defendants, in any view of it, to the plaintiffs till the latter disclosed their interest and gave notice. Was it not then as easy and as safe for the defendants to pay the balance due to the principals as to the agent? I fail to see that any prejudice would accrue to them by paying the money to the parties that they must have known were entitled to it when the truth was made known to them. The evidence does not show that, by reason of anything said or done or omitted by plaintiffs, the slightest loss or even inconvenience would result to the defendants to justify their refusal to pay the balance to the parties, who, in the absence of such loss or inconvenience, were clearly entitled to it. BIGELOW (on Estoppel), in a note at page 576, notices a case decided in a New York Court of Appeal thus stated:—T's name was forged to a note and M, after he had advanced money on it, inquired of T concerning it, and T so spoke as to induce M to advance more; *held* that the forgery was a

defence to T only as to the first advance. The case of the *Anglo-American Telegraph Co. v. Spurling*, 5 Q. B., Div. 196, sustains the view that a mere change of position, without prejudice, does not work an estoppel; and that case was decided as late as December, 1879, after that of *Knights v. Wiffin*, L. R. 5 Q. B., 660. It also shows that there may be an estoppel, as to part of a whole transaction, which may cease to be effective before the final result is reached. It is not contended that the defendants would not be exonerated from any claim of the agent if they had paid the balance of the purchase money to the plaintiffs before the truth was made known to them and they became aware of the real rights of the parties. And I think with my brother RIGBY, that, if the doctrine contended for by the defendants and adopted by the learned Judge who tried the cause be law, it must follow that any undisclosed principal who knows that his goods are being sold by his agent, and does not disclose himself before the sale as the owner, cannot subsequently do so or collect the purchase money from the purchaser,—because there was a change of position, without his intervention, by the vendee purchasing from the agent instead of from the true owner. I cannot think that that is law and am of opinion that the appeal should be allowed; and, as I can see no necessity for another trial, I think that judgment should be entered in favour of the plaintiff for the balance due and costs. It has been intimated that there was no evidence of the agency of Moore to sell the property but that, I think, is a mistake. No doubt Moore was interested in selling for the best price that could be obtained, and the plaintiffs showed their fairness in enabling him to do so. David L. Layton says respecting the sale, "I was willing if Moore was satisfied. If Moore had not been satisfied he would not have sold. Moore was anxious to get it to market to pay his bills. Surplus, if any, was to go to Moore & Lewis." * * * "We gave Moore the privilege of selling it. I told him, (Hatfield.)" Again he says, "I gave him the privilege of selling it;" and, "Mr. Moore had the privilege of selling it to get the best price for it, and he had consented to sell the timber." It is no wonder if, after that understanding, as the defendant, Moses Hatfield, testifies, Layton "said he had

some timber in charge and had no authority to sell it;" because he had given that authority to Moore and could not sell without a breach of faith. The witness proceeds, "And he said he would go up and send Moore down to me." * * * "Moore came down in about an hour and a half," when the purchase was completed." Sampson Moore testifies that Layton said to him, "Hurry down as soon as you can and sell your timber and do the best you can with it" and he did so. Again, he says, "I made the timber and laid it over and had the sole control over it for the summer. Layton authorized me and knew all about it." I quite concur in the view that if there was no agency the sale would be a wrongful conversion which the plaintiff could waive, affirming the contract and claiming the benefit of it so as to entitle him to recover under the declaration in this case, if not estopped. We cannot prevent the plaintiff from telling the truth and asserting his rights at any stage of a transaction, simply because he once told an untruth, provided the opposite party is not prejudiced as to subsequent rights by his doing so. If it were otherwise we would be simply punishing the party, which we cannot do in an action like this.

SMITH, J., concurred.

THOMPSON, J.—The first argument of this appeal took place on December 14th, 1882, before a division of the court composed of my brothers WEATHERBE and RIGBY and myself. It seemed quite apparent to us all that the learned Judge of the County Court had erred in treating the plaintiff's bill of sale as a mortgage,—in this common law suit,—without any pleadings which would raise such a question, even if such pleadings could have been put on the record in such a suit and between these parties; that he further erred in proceeding to decide that the amount for which the bill of sale should be treated as a mortgage had been discharged, and that his view that the plaintiffs were estopped from maintaining this action, in consequence of what had passed between them and the defendants at the time of the sale of the logs was also erroneous. We therefore stopped Mr. Townshend's reply, but as one of us afterwards considered the last mentioned point as

less clear than was at first supposed, we heard a re-argument on 16th March, 1883. It has since been explained to the court by counsel for the defendants that at these arguments, before the division, they were ill-prepared, and somewhat taken by surprise. This circumstance will probably account for the fact that some points were pressed on us then which cannot be applied to the case upon any sound principle, but which it may be well to notice now that the cause has reached its final stage after another very full argument and after ample time has been taken for deliberation. It was said that plaintiffs could not recover because there was a want of privity between them and the defendant. No one will dispute that privity is essential to a plaintiff's right to recover on an express simple contract, but the privity will often, even in such cases, be implied—as, indeed, where an express contract cannot be shown, the whole contract will often be implied. It is established law in England and here that a mere stranger to the consideration cannot enforce performance of the contract by an action thereon in his own name, although he be the party avowedly intended to be benefited thereby; *Tweddle v. Atkinson*, 1 B. & S., 393; *Forsythe v. Forsythe*, 1 R. & G., 382, and *Cossitt et al. v. Cook*, decided by this court a few weeks ago. No doubt there are also cases in which, though the consideration moved from a plaintiff, he might be a stranger to the contract. These doctrines, however, have no application to such a case as the present. As regards the first doctrine the plaintiffs were not strangers to the consideration,—the logs were theirs. As regards the second, they stood in such a relation to Lewis & Moore,—by owning the property, and by empowering Lewis & Moore to sell it,—that the law will imply a contract with them, and for them, just as it does in all cases in which one authorizes another to sell his goods,—as principals do with agents in the thousands of cases which occur daily, the law allowing them to recover on their agents, contracts, unless they have done something to destroy their right; see *Thompson v. Davenport* and notes, Smith's L. C., vol. 2, p. 349. The law goes far greater lengths than this is implying not only privity but all the other elements of a contract, where one

takes the goods, or money or work of another and nothing is said by either party, and notably where one takes the goods or money of another tortiously and without any idea of contracting, and that other chooses to waive the tort and sue for the value of the goods or for the amount of the money taken, and more notably still in such cases as *Hill v. Perrott*, 3 Taunt, 274, where a contract to pay for goods was implied on account of the defendant's fraud, although he had no dealings with the plaintiff and made the contract, by which he got the goods, with a third party, *Abbott v. Barry*, 2 B. & B., 369, being to the same effect. See also *Story (W. W.) on Contracts*, sec. 451, 451 a. It is clear that there is privity between a principal and those with whom his agent makes a contract. It would perhaps be putting the right of the owner of the goods on too narrow a ground to conclude that it must depend on even an implied contract, although the facts in this case bring it within the line of implied contracts. The right to recover is incident to the right of property. Lord BLACKBURN, in *Mildred v. Maspons*, 8 App. C., 887, having before him the analogous question of the right of the owner to recover the insurance money on his goods, the policies having been effected and the moneys received by a firm of merchants in London as agents for a firm in Havannah, and the defendants not knowing the plaintiffs, but the plaintiffs being really the principles of the firm in Havannah, held, as all the Lords of Appeal did, that the plaintiffs could recover, notwithstanding the objection as to want of privity. He held that this followed the right of property, and illustrated it by referring to the plaintiffs' right to recover the goods themselves: "The plaintiffs' case in no respect depended on the existence of any privity of contract between the plaintiffs and the defendants. They had a right so long as the goods remained in specie, a right consequent on their property, to demand and take their goods on satisfying whatever lien paramount to their right there was on the goods. This depended not on agency, nor on privity of contract, but upon property. And the defendants, having effected the insurance for the benefit of all whom it concerned, they had the same right to the insurance money that they would have

had to demand the goods." Thus he refutes the theory that privity is necessary to be even implied in an action for money had and received; 8 *App. C.*, 887. It seems to me, therefore, that the objection of want of privity in this case was against very plain and elementary principles, and that counsel for the defendants were right in abandoning it at the last argument. Such an objection would equally avail against a principal seeking to recover on the contract made by his agent,—especially against a principal who had not been disclosed. It was relied on in *Ferrand v. Bischoffstein*, 4 C. B., N. S., 710, and there distinctly over-ruled. But the defendants' counsel strongly objected to the plaintiffs being considered principals and to Lewis & Moore being considered their agents. Such they were, however, in my judgment, although they did not use the conventional phrases by which that relationship is often created. Let us for the sake of plainness drop these legal expressions, "principal" and "agent" and put the transaction in common words and we shall then see that it still falls clearly within the principles and authorities which I have already referred to: The plaintiffs, having a lot of timber under bill of sale, made a firm named Lewis & Moore their instruments to effect a sale of it by referring the defendants to that firm and stating that that firm had full power to effect a sale. (It is a matter of no significance that Lewis & Moore had been the original proprietors, unless we are to consider the bill of sale from them to the plaintiffs as a mortgage, and that it had been paid off, and we are all agreed that that could not be done.) Does not the relation of principal and agent arise from what has been so stated? In *Hill v. Perrott*, before mentioned, and the cases of that class, the defendant was held liable because he had made another man his instrument to purchase the plaintiff's goods, although the plaintiff knew nothing of defendant at the time of making the contract. But the appellant's counsel fell back upon the objection that because the plaintiffs had so made Lewis & Moore their instruments to effect the sale they were estopped from claiming the purchase money. This is, after all, a repetition, in a more specious form, of the same objection, and is refuted by the

very same principles as those which they found too strong for them when they stated it in the other form. I say it is refuted by the same principles as I have mentioned above because if a contract between plaintiffs and defendants is to be implied from the circumstances that plaintiffs owned the logs, left them with Lewis & Moore, directed the defendants to Lewis & Moore as able to sell them, and that defendants did so purchase them, equally is it true that plaintiffs can avail themselves of that implied contract. It would be a manifest absurdity to say that all the circumstances create an implied contract that plaintiffs will deliver the logs and that defendants will pay for them, and then to say that the same circumstances estop the plaintiffs from recovering. The law will not imply a contract from a set of circumstances which would defeat a contract. I dismiss as quite unimportant,—as regards the money now in controversy,—the fact that the defendants, before they knew all the facts, but after they had made the purchase from Lewis & Moore, paid a sum of money to Lewis & Moore on account of the stipulated price. As to that sum of money, no doubt, the defendants have a right to say to plaintiffs: "You made Lewis & Moore your instruments to sell us these logs, and it is your loss if we dealt with them, as being the principals, before you made known the facts to us." Here comes in that class of cases in which undisclosed principals have been held bound to allow the set-offs which the purchasers had against their agents at the time when they intervened, such as *Isberg v. Bowden*, 8 Exch., 852; *Tucker v. Tucker*, 4 B. & Ad., 750; *Sims v. Bond*, 5 B. & Ad., 389; *George v. Cloggett*, 7 T. R., 359; *Ramazotti v. Bowring* 7 C. B., N. S., 851, and *Bowmanville M. Co. v. Dempster*, 2 R. & C., 273, affirmed in 2 *Sup. C. C.*, 21. From the first of these cases, 8 *Exch.* at p. 859, I quote this passage by MARTIN B.: "The real ground on which that and many other cases proceeded, decided on the same point, is that where a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the real contracting party, and is entitled to the same defence, whether it be by common law or

statute, payment or set-off, as he was entitled to at that time against the agent, the apparent principal." As regards the law of estoppel no difference can be said to exist between "permitting an agent to sell as apparent principal," and representing him as principal. Passages like that which I have just quoted from *Isberg v. Bowden* might be multiplied until they would fill a volume, and yet it has been argued here that after such a representation, or permission, the owner of the goods cannot intervene, but is forever estopped from asserting that the goods were his.

As I have said, the objection is more specious when presented in the estoppel guise, and that is on account of the form in which the doctrine of estoppel is occasionally expressed. As laid down by Lord DENMAN in *Pickard v. Sears*, 6 A. & E., 471, and in *Gregg v. Wills*, 10 A. & E., 97, and by Baron PARKE in *Freeman v. Cooke*, 2 Exch., 654, it is, in effect, that "where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Counsel, in the present case, insisted that "the former" is estopped forever afterwards, and in all kinds of proceedings, whatever bearing they may have on the original transaction, and even though they have no bearing on it. This would be holding that the doctrine of estoppel, instead of being a reasonable one, intended to prevent dishonesty, and to save from loss those who have been wilfully misled by others—a principle harmonizing with all the doctrines relating to contracts, is an arbitrary rule which, when it come in, drives all other principles out, and enables the party who can show some detriment or some change of position, not only to indemnify himself but to make the party who has misled him practically an outlaw as to everything connected with the transaction. If this idea were to prevail the estoppel is not to be limited to those proceedings which would tend to impeach the title which has arisen in consequence of the misrepresentation, but the party who has made it is not to be allowed to show the truth, even in a criminal proceeding, or in

any other proceeding, no matter how remote to the title which the estoppel has given rise to. No principal would even be allowed to revoke the authority of his agent because some one has dealt with the agent as such, and we are told it is no answer to say that the revocation is not to affect what has been done. One whose goods have been converted can never recover their value in *assumpsit* because if he has waived the tort he has affirmed the transfer of the property and is estopped from saying that the money should be his. Finally the rights of principals to avail themselves of their agents' contracts would be gone. For such a position no authority was mentioned but we had long and earnest arguments that the doctrine of estoppel and the cases on estoppel might bear all this tension. The fact that plaintiffs represented to defendants that Lewis & Moore had authority to sell the logs would, of course, have estopped them from claiming the logs as their own, after the sale, for the purpose of defeating the sale. They have made no such attempt;—they allege that they authorized the sale, they desire to affirm it and to have the proceeds. They negligently stood by and allowed Lewis & Moore to get part of the proceeds and that part they cannot recover, but why should we say that they must always stand by and cannot be allowed to acquaint the defendants with the real facts in order to prevent further detriment and change of position, and therefore a further estoppel? If Lewis & Moore, instead of selling logs to defendants, had been allowed by plaintiffs to effect a loan of \$100 on them, what was there to prevent them from making known their title after that, and preventing further advances from being made, and claiming the logs after satisfying to the defendants the amount of their advances—the amount by which they were “prejudiced,” in the language of estoppel. True, the plaintiffs did enough to give authority to Lewis & Moore to sell the logs, and so are bound by what that firm did; see *Cole v. North Western Bank*, L. R., 10 C. P., 426. The estoppel goes that far and no farther, and plaintiffs have done nothing to forfeit the rights of principals. As was said by JAMES, L. J., in *In re Collie, ex parte Adamson*, 8 Ch. D., 817: “Nobody ought to be estopped from averring the truth or asserting a just demand,

unless by his acts, or words, or neglect, his now averring the truth, or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said, or done, or omitted to say or do." In *Pierrepoint v. Barnard*, 5 Barb., 364, (reversed, but on another point,) it was well said: "An estoppel in *pais* is never allowed to be used as an instrument of fraud; it is to be resorted to solely as a means to prevent injustice; always as a shield but never as a sword." I think that in his judgment in the division court my brother WEATHERBE misunderstood me in supposing my view to be that only payment of the money would make "a change of position." He cited cases in which change of position occurred without payment of money, which I never could have doubted. Lien, set-off, and many other elements might work a change of position, but those elements are not here, and I think, therefore, that I need not discuss what the state of affairs would be if there was something here to show a change of position. The making of a contract with Lewis & Moore would not suffice, because a plain answer to any claim of theirs would be the bill of sale and the claim of the plaintiffs under it,—or, in other words, their intervention as principals. As I have said for the extension of the doctrine of estoppel, for the position that when it comes into any transaction there is no such thing as putting an end to its effect, no authority was mentioned. The authorities on the other side are so very numerous that I propose only to mention one or two of each class.

First. There is the class of cases which show that the owner of the property may intervene though he was up to that time unknown to the defendant though he had authorized another to sell the property, and though the purchaser had made a contract with that other, and had paid him part of the purchase money, or had a set-off and lien against the other. This class is illustrated by that from which I have quoted a passage of MARTIN Baron's judgment, and by the cases which I have mentioned in that connection, and would seem to me to meet nearly all that can be urged for the defendants here. But I proceed with others, because

the authorities will be found to meet even the minor points which defendant's counsel took in support of their theory, and because my brother WEATHERBE makes this suggestion in his judgment in division: "If notice or an 'opposite statement,' that is a statement of the fact made by plaintiffs who have misrepresented the fact, were to be used to 'do away with' the 'first statement' after the position of the defendant was changed I should have thought this would be introducing a new element in the law of estoppel." And, following this, at the last argument we were given to understand that no case could be found in which mere notice of the facts was enough. I may say, however, that there is no necessity for refinement as to the difference between notice and knowledge, because one of the defendants said in his testimony that beside having notice of the bill of sale he knew of it.

Secondly. Then we have the class of cases which deal with the effect of notice in preventing further detriment. In *Mildred v. Muspons*, 8 App. Cas., 874, at page 885, Lord BLACKBURN remarked that the proviso in the Factors Act which excepts from the protection of the Act consignees who, at or before the time of their advances, &c., in respect of which their lien is claimed, have had notice that the person shipping in his own name is not the actual and *bona fide* owner of the goods, is a re-enactment of the common law. He thinks that knowledge is inferior to notice, that knowledge satisfies the common law, and notice satisfies that and the statute also. I quote these passages from his judgment: "The proviso may have the effect of extending the rights of consignees. For I take it that the common law was that knowledge, however obtained, that the goods were not the property of the person dealing as a principal, prevented the advancer from having a lien for the advances made after such knowledge, on the ground that it was unjust, with knowledge, to take one man's goods to pay another's debts." * * * "I should be unwilling to decide without more consideration either way, whether knowledge, however acquired, did or did not deprive the consignee of his rights of lien for advances made subsequent to the acquiring of that

knowledge, and it is unnecessary to decide that question now, for notice undoubtedly does so deprive him." * * * "It is not necessary that there should be notice of the name of the person who has an interest, but only that there is a person having such an interest." Lord SELBORNE, in the same case, seems to doubt that there is any distinction. This was not a case of strict estoppel but it was a case which the Factors Act makes precisely parallel—the case of the owner of goods being bound by the liens put upon them by one whom he has suffered to have the possession, or to have the documents indicative of title. Then there is the case of *Dunstan v. Paterson*, 2 C. B., N. S., 500, in which it was distinctly decided that although a woman who had represented herself as being the execution debtor, and had been arrested as such, was estopped from bringing an action for the arrest, she could recover for the detention after notice of the real facts, because the estoppel had ceased. As to the notice or knowledge of the bill of sale being sufficient to bring home to the defendants a knowledge of its nature, the expression of Baron ALDERSON in *Whithead v. Jordan*, 1 T. & C., 303, represents authorities: "When a party having knowledge of such facts as would lead any honest man using ordinary caution to make further enquiries, does not make, but, on the contrary, studiously avoids making such obvious enquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained."

Third. To meet the contention that an estoppel, once existing, cannot be put an end to, the authorities are represented by the case of *Dunstan v. Paterson*, before cited, and by *Swim v. Anglo-American Telegraph Co.*, 5 Q. B. D., 188, in which the loose expressions about estoppel, which are so prevalent, were criticised, and it was held that a firm which had been induced by circumstances sufficient to raise an estoppel to advance money on shares which their vendor did not own had no title to the shares, and, although they were protected to the extent of their advances by the doctrine of estoppel, that all operation of the estoppel ceased as soon as they were paid, the detriment being thereby put an end to. I entertain no doubt that judgment should be entered for the appellants

(plaintiffs), and I would not have dwelt at length on any branch of the case if it had not been for the respect which I entertain for the opinion of the Judge of the County Court and for that of my brother WEATHERBE who does not concur in the decision of the court.

WEATHERBE, J.—The fallacy, as I think, is in supposing that plaintiffs can, in the face of the finding of the learned judge below, recover as undisclosed principals on a contract made by their agent for their benefit. It is admitted that they were estopped from the first in claiming the property itself. And it is also admitted that they can only recover now by having given notice that they were the principals, and shewing that the contract was made by their authority, for their account and benefit, by an agent duly authorized to make them liable thereon, and acting within the scope of his authority. Even in that case the defendants would have reserved to themselves all the equities arising out of the conduct of plaintiffs. That includes the question of estoppel and notice and knowledge upon which we have heard nothing new, and I have already said all that seems to me necessary.* Counsel for plaintiff in arguing the case hesitated to put it on the ground of principal and agent.

It must be admitted at once that if plaintiffs had done nothing to estop themselves—if they had not misrepresented

* The following passages from the learned Judge's judgment in the division court are alluded to:—

"None of us have difficulty in saying that plaintiffs in consequence of their having represented Lewis & Moore as the owners of the timber would be estopped from claiming the timber or disturbing the sale, and it is admitted that plaintiffs are also estopped, by reason of the concealment, from claiming the purchase money paid by defendants to the vendors before they disclosed their claim as an interest in the property. The only question is whether the estoppel is to apply to the whole transaction. The well-known case of *Pickard v. Sears*, 6 A. & E., 471, is very much like the present. There the plaintiff had a bill of sale of machinery, and other articles, executed in August by one Metcalfe. Some months afterwards the goods were sold under execution and bought by defendant. Plaintiff allowed the sale to proceed without objecting. In that case he did nothing to represent Metcalfe as the owner, and he represented himself as a creditor of Metcalfe to the extent of £500, but made no mention of the mortgage. Defendant purchased in ignorance of the plaintiff's interest. Afterwards plaintiff demanded of defendant the sum advanced, which being refused he demanded the goods. Lord DENMAN in giving judgment laid down the rule as to estoppel in terms which have been repeatedly affirmed in subsequent cases. Afterwards in *Gregg v. Wells*, 10 A. & E., 97, the same Judge said: '*Pickard v. Sears* was in my mind at the trial, and the principle of that case may be stated even more broadly than it is there laid down.' A party who negligently or culpably stands by and allows another to contract on the faith and

the facts, as it is admitted they did—and if they could have, and had disclosed themselves by showing, before action that they were absolute owners, and not merely as having a claim for a balance on a bill of sale, (which in reality is only an equitable mortgage, and which they, without producing the instrument, only represented as such,) it would have been competent for them to show, if they could do so, that the contract was made for their benefit and by their authority.

But assuming there was no concealment or positive misrepresentation, and that they disclosed themselves and shewed their right of absolute ownership before action, what are their position and rights under this contract? Do they show in the evidence that Moore, who signed the contract, acted as their agent in making it? Had he authority to bind them to the terms? Did they intend to be rendered liable to be sued for non-performance? Was he delegated by them to arrange

understanding of a fact which he can contradict cannot afterwards dispute the fact in an action against the person whom he has himself assisted in deceiving. These cases were founded on previous authorities, and the rules enunciated have been ever since acted on. No doubt can exist, I think, that the case before us comes within the rule as stated above. The plaintiff, to say the least, stood by and allowed the contract to be made on the faith and understanding that the vendors were the owners of the timber, and if the rule is to apply how can the plaintiffs now in an action against the parties whom they have deceived, recover. If this case is to be governed by some exception to the rule, what is that exception? One contention is that the cases referred to were trover for the goods, and that while the estoppel applies it does not apply in an action for the money. The reason, as I understand it, that trover cannot be maintained is because plaintiffs cannot be heard to say now that they are owners of the timber, having permitted the vendors to exercise their authority as such, that is they cannot be permitted to maintain any action in court to sustain which they require to establish the fact which they before represented differently. That is the simple principle which governs, and I cannot see that the form of action has anything to do with the question. It applies, as far as I know, to all forms of action."

"If notice or an 'opposite statement,' that is a statement of the fact made by plaintiffs who have misrepresented the fact, were to be used to 'do away with' the 'first statement' after the position of the defendant was changed, I should have thought this would be introducing a new element into the law of estoppel. Besides notice to the defendants is one thing knowledge of the defendants is another thing. The law is that where one by his words causes another to believe the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded, &c. Even if the time had not passed for the plaintiffs to do away with their former statement, they should, I think, show, or it should be found as a matter of fact that the belief caused by the representation, had changed, or in other words that defendants had knowledge of the true ownership of the timber in this case. The notice relied on here to defendants of the plaintiff's ownership of the timber it must be confessed is very vague. There was notice of a bill of sale it is true, but that notice is distinctly coupled with a claim for an amount due for supplies. There was no notice of absolute ownership or the right of property or possession, or the full price, and the secret bill of sale was never produced till the trial in court. It cannot be said that defendant had before payment of the full price knowledge of the ownership. We could not say that without a new trial."

the terms and fix the price? The plaintiffs can recover in no other way—I know of no other law upon which the County Courts are to be guided by us in deciding this case, than by establishing these questions in the affirmative. I do no mean express authority, but implied authority. Did the relation of principal and agent exist in any way to make this contract as it was made,—is there any evidence of that, which the learned judge below was bound to notice and decide on, in favour of the plaintiffs? If they did not furnish the County Court with such evidence they were not entitled to judgment there, and, as I apprehend, are not entitled to our judgment. I think there has been some misapprehension at the bar as to the real nature of the contract. Before us it was treated merely as a contract for the sale of timber, lying at a specified place, executed by delivery there, good without writing as against as the Statute of Frauds. In point of fact there was no payment and no delivery and the writing was necessary. It was not a contract merely for the price of the timber. It was a contract which included the price, but it was a contract also for the carriage or freight, or rafting and loading and freight together, of the timber, in the conveyance of it from Parrsboro' to Hantsport. Moore bound himself,—or as the authorities show, (*Beckham v. Drake*, 9 M. & W., 79; 2 H. of L. C., 577; 2 Sm. L. C., 7th Am. Ed., 380,) himself and his partner although he alone signed, to deliver the timber at the port of Hantsport for \$7.25 per ton by the Hantsport survey. How much of this was for the price of the timber, and how much for the transportation we have no means of knowing? The parties themselves, probably, did not enquire, or distinguish, or know. The contract in writing is signed by defendant and Moore, and plaintiffs denied that they had anything to do with the timber and refused to become surety for performance of the agreement to deliver. Is there any evidence that previous to the making of this contract plaintiffs authorized Moore to make a contract binding them to transport the timber? The learned Judge had no evidence to show any agency or any authority to make any contract for them. It is clear that at that time plaintiffs were merely looking for the balance of an account and did not really claim the timber.

They in fact,—and this is not denied,—refused to be bound in any way and said they were merely taking care of the timber for Moore. But in the most extreme view how could the court below find that the plaintiffs authorized Moore to make a contract to include the carriage of the timber? After the making of the contract between Moore and defendants it appears, in conveying the timber to Hantsport, plaintiffs advanced something to Moore & Lewis towards their performance of the contract in delivering it, and in bringing this action they claimed the full price according to the agreement for the timber to be delivered, and in addition they had a claim in their particulars for the sum advanced toward conveyance of the timber, and one of the plaintiffs gave evidence, in conflict with the written agreement, that they took the timber over for Smith & Hatfield, but afterwards this was abandoned and struck out of the particulars as is shown by the learned Judge as follows: "In the course of the trial of this cause the sums claimed, plaintiffs' particulars, such as two dollars for getting chains for rafting timber and hired help, and freight on timber to Hantsport, forty dollars; and piling for rafting timber, in all forty-two dollars and sixty cents, were abandoned by plaintiffs." This shows that the difficulty of recovering anything more than the price was appreciated by plaintiff's counsel in the court below. The majority of the division court has given judgment for \$100.70 and I am unable in any way to understand how that sum is made up. It cannot be said that plaintiffs authorized Moore to make the contract binding them, especially when they expressly at the time gave notice to defendants that they would not be bound, and if they had been sued by defendants as principals for non-delivery at Hantsport, and if that were the issue on this evidence the judge would have been bound to acquit the plaintiffs of liability. It will not, I suppose, be pretended that the facts, at any rate, were not for him. And if plaintiffs did not authorize Moore to make them liable and they did not intend to be made liable on the contract, how can they claim that it was made for their benefit. Though it was at one time held otherwise it is now established law in England and several of the United States, including Massa-

chusetts, that there is no right in a third person to sue on a contract made in his favor and for his benefit. The House of Lords in *Peddie v. Brown*, 3 Macq. H. L. C., 65, 3 Jur. N. S., 895, decided in 1857, that one who is not a party to a contract or named in it, or clearly designated as the person for whose benefit it is made, cannot maintain an action upon it. Whether, even if so named or designated, a suit could be sustained was left undecided, and, in 1861, in *Tweedle v. Atkinson*, 1 B. & S., 393, that point also was settled, and in the words of WIGHTMAN J., "it is now established that no stranger to the consideration can take advantage of a contract made for his benefit." In 1871, in *Carr v. National Sec. Bank*, decided in the Supreme Court of Massachusetts, GRAY, J., in delivering the opinion of the court said, "it is a general rule of law that upon a promise made by one person to another for the benefit of a third, from whom no consideration moves, the latter cannot sue, and the exception to this rule, which holds a person in whose hands funds have been placed to pay creditors of the depositor, liable to actions by them, has not been extended to this commonwealth or in England to a case in which neither such creditors nor the amounts of their debts are named or ascertained at the date of the promise," and he cites *Miller v. Whipple*, 1 Gray, 317; *Dow. v. Clark*, 7 Gray, 198; *Frost v. Gage*, 1 All., 262; *Fairlie v. Denton*, 8 B. & C., 395; 2 *Mun. & Ry.*, 353; *Gerhard v. Bates*, 2 El. & Bl., 476, and he adds, citing numerous authorities, that the view thus stated "is in accordance with the law as established in England, in New York and in Pennsylvania, with the opinions heretofore expressed by this court, and with the recent unanimous decision of the Supreme Court of the United States." Whatever difficulties may have existed it must not be supposed that it can now be disputed that the undisclosed principal can come forward, (provided he exercises his right with proper diligence and acts so as not to render the enforcement of his claim unjust to the debtor,) and claim the price of his chattels though the contract was made between the agent in his own name with the vendee, and where the contract was required to be in writing as in this case, but the proposition must be taken with many qualifica-

tions. It is said in a note to the leading case of *Thompson v. Davenport*, Sm. L. C., 7 Am. Ed., 373, by the learned editors—and numerous cases are cited—that “where an agent contracts for an undisclosed principal the contract may in general be enforced either by or against the principal or agent unless its terms, or the circumstances under which it is executed, indicate an intention to bind or entitle one to the exclusion of the other.” It is further said, in the note referred to, that “when the presumption, from the omission of the principal’s name from the writing, of a design to exonerate him does not arise, or is repelled by the circumstances, an action may be brought by or against the principal, whether he was or was not known to the other contracting party, and it seems to be the settled principle that where the parties, principal, agent and buyer agree together that the agent for every purpose stand in the place of the principal, the principal will be excluded from any right of action. In *Huntington v. Knox*, 7 Cush., 371, which professes to be based on English law, the case seems to be put upon the ground that the principal could not sue on a contract to which he was not a party, although he may proceed upon the implied promise arising from the consideration, and give the contract in evidence as the measure of damages, but in this view there would be no mutuality and the purchasers could not enforce the contract against the principal as has been pointed out in the authority last cited, and *Beckham v. Drake* already cited is adduced to show that the current of cases is in favor of regarding the principal as bound by and entitled to enforce the contract as if made by himself. In *Huntington v. Knox* the action was for the price of a quantity of hemlock bark alleged to have been sold by plaintiff to defendant. The bark was delivered under a written contract whereby A acknowledged to have received of defendant \$25 in partial payment. It was proved that the bark was plaintiff’s, and the contract made by A, her agent by her authority, but in the name of the agent himself; evidence was admitted before the arbitrator,—who found for plaintiff and reserved a question on the admissibility of this evidence,—of the authority of plaintiff to A to sell for her, and on her account. In delivering the opinion of the court SHAW,

C. J., pointed out that where a contract under seal is made by the agent in his own name the principal cannot avail himself of it to sue on it, but a far more liberal doctrine prevails in regard to a written contract not under seal. He continues, "In *Higgins v. Senior*, 8 M. & W., 834, it is laid down as a general proposition that it is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making the contract of sale so as to give the benefit of the contract on the one hand to and charge with liability on the other the unnamed principals, and this whether the agreement be or be not required to be in writing by the statute of Frauds." He shows that the distinction is marked broadly between such a case and a case where an agent who has contracted in his own name for the benefit of and by authority of a principal seeks to discharge himself from liability. "The doctrine proceeds on the ground that the principal and agent may each be bound; the agent because by his conduct and promise he has expressly bound himself, and the principal because it was a contract made by his authority for his account; *Puterson v. Grandesequi*, 15 East., 62; *Magee v. Atkinson*, 2 M. & W., 440; *Trueman v. Loder*, 11 Ad. & Ell., 589; *Tamler v. Pendergrast*, 3 Hill, 72; *Edwards v. Golding*, 20 Verm., 30. It is analogous to the ordinary case of a dormant partner. He is not named or alluded to in the contract, yet as the contract is shown in fact to be made for his benefit and by his authority he is liable." He shows that the rights of a principal depend *dehors* such a writing upon the facts, "1, that the act is done in the exercise and 2, within the limits of the powers delegated, and these are necessarily inquirable into by evidence." ALDERSON B. said in *Rayner v. Grote*, 15 M. & W., 364: "At the time when this contract was made the plaintiff was himself the real principal in the transaction, and, although the contract on the face of it appeared to have been made by him as agent for another party, there was evidence given at the trial tending strongly to show that when the first parcel of goods was delivered to, and accepted by the defendants the name of the plaintiff as the principal was then fully known to the defendants and we think that it was properly left to the jury

to infer from the evidence that the defendants, with the full knowledge of the facts, had received that portion of the goods and that all parties then treated the contract as one made with the plaintiff as the principal in the transaction." I was reluctant to offer anything more than I said in the former judgment, but as these points seemed to escape the attention they deserved, I do not wish, where a carefully considered decision of the court below is to be disturbed, to have it supposed that anything was left unconsidered which might possibly be supposed good grounds for supporting the decision from which there is no further appeal.

MCDONALD, C. J., concurred in the opinion arrived at by the majority of the court.

CREIGHTON v. JENKINS ET AL.

Before McDONALD, C. J., and SMITH, JAMES, RIGBY and THOMPSON, J. J.

(Decided April 22nd, 1884.)

Injunction.—Adequate remedy at law.

PLAINTIFF was assignee of certain chattel mortgages given by the firms of B. & B. and B. & Co. on goods contained in the premises occupied by them, and had entered and taken possession of the goods with the assent of one Blakley who represented both firms. Blakley subsequently executed an assignment for the general benefit of creditors, and gave a confession of judgment to Jenkins, one of the defendants, who entered up judgment and issued execution, under which the sheriff forcibly entered upon the premises and dispossessed plaintiff. Plaintiff thereupon applied for and obtained a writ of injunction enjoining defendants from selling the goods or removing the same or attempting to enforce the execution, and enjoining Jenkins from taking possession under the assignment to him. Plaintiff alleged in his bill that though he had had possession of the goods he had made no inventory and did not know the actual quantity of goods on the premises; that the members of the firm of B. & Co. had no means outside of the goods covered by plaintiff's mortgages and that unless plaintiff's claims were realized out of the goods he would suffer irreparable injury; that there was no adequate remedy at law; that the goods covered by the mortgages were insufficient to satisfy the amount they were given to secure; that the mortgages were given to secure plaintiff for accommodation and advances represented by negotiable paper which was daily maturing, and that unless plaintiff was permitted to sell the goods to meet said paper he would be obliged to sacrifice his private property and that the assignment and judgment to Jenkins were given fraudulently and for the purpose of injuring plaintiff.

Held, that the entry by the defendants was an act of trespass for which plaintiff had a complete remedy at law, and that plaintiff's remaining allegations were not sufficient to bring the action within the class of cases where a Court of Equity will interfere by injunction notwithstanding the existence of a remedy at law.

This was an appeal from a decision of JAMES, J., as Judge in Equity, discharging with costs a rule *nisi* to dissolve an injunction whereby the defendants were restrained from selling certain goods contained in or upon premises lately occupied by Blakely & Co., in the City of Halifax, or from in any manner intermeddling or interfering therewith, or from attempting to enforce an execution in the hands of the Sheriff for the County of Halifax, upon a judgment recovered by Thomas K. Jenkins against John H. Blakeley, or from attempting to take possession of said goods under an alleged deed of assignment made by said Blakely to said Jenkins.

The learned Equity Judge, after reciting the pleadings, gave judgment as follows:—

The first question which I shall consider, because it lies at the bottom of the whole cause, is as to the construction of the bill of sale from Blakely & McKenzie to Davidson & Crichton of 7th March, 1883. It is sworn by McKenzie, one of the grantors, that by far the larger part of the stock of goods in controversy came upon the premises since the making of the chattel mortgage. In *Reeves v. Whitmore*, 4 DeG., J. & S., p. 15, the Lord Chancellor laid down the rule in the words:—"If there had been, either upon the face of the deed, expressly, or if there could have been collected from the provisions of the deed by necessary implication, a contract or agreement between the parties that the mortgage should be a security attaching immediately upon the future chattels to be brought on the premises, the mortgagee would have a present interest in all those materials, whether manufactured or raw, which, after the date of the security were brought on the brick-field." The chattel mortgage, which is substantially as set out in the bill, after conveying goods and chattels then on the premises, proceeds: "And also all other goods, chattels and effects of the said mortgagors or either of them, in, upon or about any other place or premises wheresoever situate; and also, all other goods, chattels, property and effects of whatever description and whether of the class above enumerated or not and wheresoever situate, which the said mortgagors may or shall from time to time hereafter acquire or become interested

in." I have no doubt that the above description of goods to be afterwards acquired is too vague and general. If the words, "that may hereafter be brought on the premises," had been added, the description would have been sufficient; but no case, that I am aware of, has ever gone so far as to hold these vague, general words to be sufficient to bring after-acquired property under the operation of the deed, which, therefore, in this instance, fails to convey such property by "express words." But one must look at the whole deed to see whether a sufficient contract can be collected by "necessary implication" from its provisions. The very next clause in the deed provides for the insurance, by Blakely, of after-acquired property "on said premises." And in the condition authorizing the seizure of the goods on default we find these words, "or in case the mortgagors shall attempt to sell or dispose of, or in any way part with the possession of the said goods and chattels, including said after-acquired property, or any part thereof, or to remove the same or any part thereof, out of the premises of said mortgagors." Taking the conveying words, together with the insurance clause, and the words of this condition, there can be no doubt that by "necessary implication" from the provisions of the deed the contract was that the deed should cover such after-acquired property "as should be brought on the premises." But it is contended that, admitting this to be the case, the deed gives the plaintiff a legal title to the goods which would enable him to maintain trespass, trover or replevin for the injuries to his rights, of which he complains, and that, having an available remedy at law, he cannot come to this Court for a remedy, and therefore this injunction should be dissolved and the plaintiff remitted to his remedy at law. Many authorities have been cited to me on this latter point, but, without referring to them at length, I think they may all, including the four cases in our own reports, be reconciled on the basis of the following proposition which I have not found in any of the books, but which I have collected from reference to all the cases:—"If the plaintiff has an adequate remedy at law he cannot elect to come into this Court, because, in such case, this Court has no discretion to grant an injunction, but is absolutely without jurisdiction.

But if the remedy in a court of law is imperfect or incomplete, or not accessible, or if the sending the parties to a court of law would cause a multiplicity of actions, for instance by forcing the plaintiff to go into a court of law for one part of his claim and proceed here for the remainder, in that case this Court has jurisdiction, and the granting or withholding an injunction is a matter of discretion in the Judge." I think this proposition contains the substance of the law on this point. Does this conveyance, then, coupled with the fact that the largest part of the goods were afterwards acquired and brought on the premises and united with the stock already there, give the plaintiff a right to come here for redress? After the case of *Holroyd v. Marshall*, in 1862, 10 H. of L. Cases, 191, followed by *Reeve v. Whitmore*, which cases were for eighteen years supposed to have settled that while a mortgage of future property is void in law it is good in Equity, I was surprised that the eminent senior counsel who closed the argument contended seriously that the remedy in such cases is in a common law court. I have, therefore, re-examined the cases with care and find that while there is some room for such an impression, yet the cases show conclusively that it is erroneous. The immense importance of the question renders it necessary, especially in the present state of our laws as to insolvency, that the law should be rendered as clear as possible. I will therefore refer to the principal cases subsequent to the two I have cited, viz., *Holroyd v. Marshall* and *Reeve v. Whitmore*.

In *Belding v. Reed*, 3 H. & C., 962, (1865,) the deed, after assigning plaintiff's furniture, present and future, authorized the defendant to enter upon and continue in possession of any hereditaments and premises upon which any part of the goods, chattels, and personal estate assigned might happen to be, and to take possession of such goods, chattels and personal estate. The Court held that the property was not specific, not ear-marked. BRAMWELL, B.—The effect of this would be that the moment the assignee acquired any property within the kingdom his assignee would acquire a beneficial interest in it. But the case of *Holroyd v. Marshall* does not, I think, sustain that position. * * * A covenant or grant of this nature would confer the equitable interest in it. But here

the property acquired after the bill of sale has never become specific, so as to form the subject of a decree for "specific performance."

CHANNELL, B.—"In Equity there is a well-known rule that what is contracted to be done is considered as done," In *Holroyd v. Marshall*, the House of Lords appear only to have adopted and carried out this law. In that case the counsel for defendant expressly admitted as follows: "At law it is conceded that goods which the bankrupt acquired after executing the bill of sale would not pass to the defendant. But in Equity the rule is different."

At this time and for fifteen years after, the law was perfectly settled in accordance with this admission, but in 1880 occurred the case of *Lazarus v. Andrade*, 43 L. T., N. S., 30, C. P. Division, when LOPES, L. J., in giving judgment, made the following inaccurate statement of the law:—

"The principle deducible from these decisions, (*Holroyd v. Marshall*, etc.) is, that property to be after acquired, if described so as to be identified, may be, *not only in Equity but at law*, the subject matter of a valid assignment for value. The contract must be one which a Court of Equity would specifically enforce."

Had the matter rested here we would indeed have been puzzled how to reconcile this decision with all the previous history of the law on the subject. But the correction was not long in coming. In the following year, (1881,) SIR GEORGE JESSEL, on appeal in *Collyer v. Isaacs*, 45 L. T., N. S., 568, corrects LOPES, J., by stating the directly opposite doctrine. He says: "You cannot assign, *either at law or in Equity*, anything which has no existence. But in Equity a contract to assign the future property may have the same effect. Such a contract passes the property on its being brought on the premises." Again, in October, 1882, in *Re D'Epenewi*, 47 L. T., N. S., 158, FRY, L. J., says: "It was, in *Belding v. Reed*, admitted that at common law the debtor could not charge the property which he might afterwards acquire, but it was suggested that the deed would create a contract which, in Equity, would bind the after-acquired property." And, finally, in *Clement v. Matheson*, 47 L. T., N. S., LOPES, L. J., speaks again

and terminates the controversy. After suggesting that the question in all these cases is whether the property is so described as to be capable of being identified, he goes on to say, "I adhere to what I said in *Lazarus v. Andrade*, viz., that the property to be after acquired, if described so as to be capable of being identified, may be not only in Equity but also at law, the subject of a valid contract for value. Since the passing of the Judicature Act legal and equitable assignments practically stand on the same footing." He agrees with the dictum of JESSEL, M. R., in *Collyer v. Isaacs*, and adds: "To hold that the plaintiff must resort to Equity and has no remedy in the Queen's Bench Division of the High Court of Justice would, in my opinion, be violating the most salutary provisions of the Judicature Act, 1873, and be perpetuating an anomaly which the Legislature by sections 24 and 25 of that Act, intended to remove."

The defendant is, therefore, driven to come to this Court and use its remedies, because he has, in respect at least to the larger part of the goods, no other remedies. Then as to the remainder of the goods, those which were on the premises when the mortgage was made, it appears by the defendants' affidavits that a part of the goods on the premises were levied on by the Sheriff and are in his possession, and the remainder were taken by the defendant, Jenkins, under his assignment, and are in his possession. An action will not lie against them jointly. There must be two suits at law besides the suit in equity relating to the after-acquired property; no less than at least three distinct actions relating to this property. This fact alone would be quite sufficient to give this Court jurisdiction, or at least to add to its jurisdiction, when it had charge of a part of the goods for the diminution of suits, as a ground of jurisdiction independently of other grounds; *Spence's Equitable Jurisdiction of Court of Chancery*, 656. Much greater force is due to this consideration in the present case than merely giving jurisdiction, for without the powers of this Court being exercised, it would be impossible for the plaintiff to ascertain what portion of the goods was in the premises on the 7th of last March, what portion was in possession of the Sheriff, and what in that of Jenkins, and it would be

impossible to obtain this bill of discovery without the lapse of considerable time, and when the information was obtained the goods would be scattered to the winds at an auction room. This alone would be a conclusive ground for the exercise of the discretion of the Court. And when the answer was obtained it must necessarily be through Blakely and Mason, the managers of the business, both of whom have made affidavits in this cause, of which the very least I can say, if I refer to them at all, is that they are, on their own showing, scandalously unreliable. I may have more to say on this point at another time. I am, therefore, clear that there were several grounds of jurisdiction to grant this injunction, and that a proper discretion was exercised in granting it, and unless there is something else in the case to take away the plaintiffs right it must be upheld; and there are several considerations on this point which I am bound to notice. Mr. Ritchie has made several objections to the bill, which must, of course, be such as to sustain the injunction. The first objection which I shall notice is that by the chapter of the *R. S.*, of Bills of Sale (chap. 84, sec. 1,) unless a bill of sale is filed under the section it shall only, as against a Sheriff acting under execution, take effect, and have priority from the filing thereof. This is a mere technical objection, because the answer does not set up any defence of the want of Registry, nor was such a want in fact alleged at the argument. The omission to negative a statutory bar in the bill is good pleading. It is like the Statute of Frauds, compliance with the provisions of which need not be asserted in a declaration at law or bill in Equity. All statutory bars such as this are proper subjects for plea or answer: *Story's Equitable Pleadings*, sections 749-769. It was also objected to the bill that it asks no relief, except injunction, that it cannot serve the plaintiff's purpose by giving him any effectual relief. This is, if the plaintiff is right, rather a question for him than for the defendant. The fact on which this objection is founded was so obvious that at an early stage of the argument I suggested that an amendment was necessary, not to enable him to maintain this injunction, but to give him a full remedy. And afterwards the plaintiff's counsel asked for leave to amend his bill, without prejudice to the injunc-

tion, to which he is in this case fully entitled ; first, because the merits of this case, as far as I can judge it by the affidavits, are all in his favor ; and, secondly, because the circumstances under which the suit was commenced and the injunction issued were such as to entitle him to consideration. He was in possession of a large stock of goods, over which he held a lien for a large amount, and these were taken violently from his possession on the 19th September. The summons in this cause and also the writ of injunction were issued on the very next day, September 20th, so that the plaintiff had but a few hours to take the steps necessary to prevent, by writ of injunction, the removal of the goods ; and, in these circumstances he prepared his bill, confining his prayer to an injunction only. I think that he is clearly entitled to such an amendment of his bill as will enable the Court to give him an available possession and use of the goods if, on the evidence to be taken in the cause, he can establish the right which he claims. That the prayer for an injunction only is a sufficient prayer for relief to entitle the plaintiff to maintain his suit and to sustain this injunction in the meantime is, in my opinion, indubitable. Suits in Equity have often been brought for an injunction only. In the case of *Lumley v. Wagner*, for specific performance, the Court said they could not compel the defendant to sing in the plaintiff's theatre, but they would do the next best thing, by granting him an injunction against the defendant singing in public elsewhere. The injunction here has served the plaintiff's temporary purpose, and it is now open to him to amend his bill by asking *inter alia* such further relief as may be necessary for his interest. For the purpose of obtaining and sustaining the injunction the bill is, in my opinion, sufficient as it stands. It is put most strongly to me that there is irreparable injury shown by the plaintiff's affidavits, but this is only requisite when the extraordinary aid of the Court is sought in aid of the proceedings of other Courts, or to restrain injury *pendente lite*, as for instance in *Moren v. The Shelburne Co.*, Ritchie's Eq. Dec., 134, and *Lockhart v. Mott*, (unreported), cited by the defendant's counsel, &c. In many cases the fact of irreparable injury is the foundation of the jurisdiction of this Court to interfere, and in

such cases the injury must be shown, but not in cases already within the jurisdiction of this Court and pending in the Court such as the present. *Forrest v. Muir*, Ritchie's Eq. Dec., 58, is a case sustaining this position. But if it were necessary to establish this fact the injury here would be irreparable, because the refusal of an injunction would be the absolute destruction of the plaintiff's lien on the goods for the security of his debt. This lien is his whole property in the goods, as much his property as the coat on his back, and if they were permitted to be sold at auction the effect would be the absolute and irremediable destruction of the plaintiff's whole right, for which, in this case at least, where the remedy for the future acquired goods is exclusively in this Court, he is precluded from any common law remedy. It has been contended before me that the plaintiff's lien was put an end to by an alleged release given by Davidson & Crichton to McKenzie, on his retirement from the firm of Blakeley & Co., on the 30th August last. The paper is not under seal and it is signed by one only of the partners of Davidson & Crichton. This, it is contended, released Blakely and thereby extinguished the debt on which the mortgage is founded. If that were its operation Blakely was the only party to take advantage of it. But after McKenzie's retirement he went on with the business, recognized the rights of Davidson & Crichton under the bill of sale, admitted his indebtedness, and asked Davidson & Crichton to take possession of the goods under the bill of sale.

There were several other positions taken and contended for by the opening counsel which depended on statements contained in the affidavits adduced by him to sustain the rule *nisi*. But these affidavits are fully answered and every statement in them which would make in favor of the application so completely contradicted that I do not feel it necessary to go into any further consideration of them, except on one point. Two of the affidavits for the defence allege that the bill of sale of 7th March was given on the promises of Davidson & Crichton that it should not be put on file lest it should injure their credit. This is denied in the plaintiff's affidavits, but there is abundant evidence that the fact of the existence of this security was by Davidson & Crichton communicated early in 1882 to the

Merchantile Agency, and was well known to the business community. Davidson & Crichton were in the habit of guaranteeing, not only the foreign importation of Blakely & Co., but purchases made in the City of Halifax, and it would appear by the affidavits in answer to the rule that the indebtedness of Blakely & Co. to parties whose claims are not so guaranteed cannot exceed a few hundred dollars; and this is accounted for by the fact that, owing to the publicity of the mortgage, they had little or no credit in the community. So far as I can be guided by the plaintiff's affidavits, on which alone I must act when they conflict with the defendant's affidavits, I am satisfied that the different chattel mortgages and the assignments thereof were for good consideration and free from all fraud and concealment, that they are regularly executed, that there is due to the plaintiff thereon at least \$10,000 besides \$15,000 of notes in the Merchants' Bank which are endorsed by the plaintiff and which had not matured when the bill was filed, and these notes, by the express terms of the mortgage, are protected and payable out of the proceeds of the goods. An objection was taken to the form of the injunction that it does not specify whether it is temporary or perpetual. It does not specify any period or event when it shall cease to operate, and, therefore, it is contended that it is a perpetual injunction, and the same objection is made to the bill. On reference to the order for injunction I find that it is that an injunction shall issue to restrain the parties until the further order of the Court. My construction of the prayer and the writ is that, not being stated to be a perpetual injunction, its meaning is that it shall stand only until the further order of the Court. It could mean nothing else, as a perpetual injunction can only be granted after the hearing. If I am wrong as to this, at least the parties had always the opportunity of coming in and asking that it be made more explicit, and I do not think a mere technical omission to insert in the writ the limitation prescribed in the order on which it was issued,—an omission natural in the circumstances of haste under which the proceedings taken and so easily remediable,—should entail on the plaintiff the serious consequences which would follow the dissolution of this injunction. Upon the

whole case I do not see that the defendants have made out any grounds for dissolving the injunction, and the order *nisi* to dissolve it will be discharged with costs.

The defendant will apply to the Court for an order to amend his bill.

Ritchie, Q. C., McCoy, Q. C., and Weeks, Pearson & Forbes, in support of appeal.—The larger portion of the property on the premises was after-acquired and did not pass under the transfer from Blakely & Co. to Davidson & Crichton, and therefore could not be transferred to the Merchants' Bank, or by them to Peter Crichton. An injunction will only lie where specific performance would be decreed, and specific performance cannot be decreed of part of a contract. The plaintiff's bill claims the entirety, and the party is in possession of the whole, and there is no means of distinguishing. The clear intent of the conveyance was to cover everything on the premises or off the premises, or to be acquired or placed there, and other portions of the deed should not have been referred to to control the conveying clauses. If the allegations of the bill are correct the acts of the sheriff and Jenkins would have subjected them to damages in an action of trespass. (RIGBY, J.—If Crichton had gone into possession under an equitable title, would not replevin lie?) Certainly. If the plaintiff cannot get an injunction on the allegations in his bill, he cannot entitle himself by subsequent affidavits. (*Meagher, Q. C.*—That is not in the grounds of appeal.) The second ground is that the plaintiff's bill did not disclose grounds for relief in Equity. That is sufficient. Our argument, based on that is that the plaintiff cannot import allegations in affidavits into the bill to supply defects in the bill itself. (McDONALD, C. J.—I think the contention is quite within the ground.) *Cressy v. Beaven*, 13 Simons, 99; *Dawson v. Yates*, 1 Beav., 301; *Burgess v. Horn*, 14 L. T., 461; 2 *McN. & G.*, 238. The bill should disclose all the facts. The bill of sale should form part of it. The bill only sets out the general conveying clauses, and does not set out that portion on which the learned Judge based his judgment in regard to the conveyance of after-acquired property. The Court will not interfere

between parties to restrain a contract for the sale and delivery of chattels which could not be specifically enjoined; *Addison on Contracts*, 1129, 1130, *L. R.*, 17 Eq., 132; 2 *H. & N.*, 404; *Jacobs' Fishers' Digest*, vol. 5, p. 6514; *L. R.*, 22, Ch. Div., 835. The Court cannot decree specific performance of a contract in part; 15 *Beav.*, 493. The Court will not interfere where the remedy is clear at law; 2 *M. & G.*, 238; 1 *S. & S.*, 594. The plaintiff had an adequate remedy at law, inasmuch as the bill admits possession in the plaintiff and ouster by the defendant, for which trespass would lie. The plaintiff misrepresented and suppressed facts in his bill. He suppressed the fact that there was a yearly tenancy of the premises undetermined, and that plaintiff had no right in the premises. There were notes to the amount of \$15,000 outstanding and unmatured; 3 *Mylne & Craig*, 799; *Brice on Ultra Vires*, 1034; 2 *Daniel's Ch. Prac.*, 1664; 16 *Beav.*, 279. The bill of sale was held secretly for some months after it was made. The bill does not mention that it was recorded at all. Important parts of the bill of sale relied on were not set out. A transfer to the Merchants' Bank by Davidson & Crichton is alleged, and the fact that only one of the parties executed it is suppressed. The securities cannot be divided; *L. R.*, 1 P. C., 50. A party applying for an injunction must show that his own conduct has been fair; 1 *Joyce*, 1035; 1 *Hare*, 1. The bill should have prayed definite equitable relief.

Harrington, Q. C., and *Meagher, Q. C.*, contra.—The plaintiff's bill sets out that the bill of sale was to cover after acquired property, wherever situate, and was to be a continuing security to cover indebtedness to Davidson & Crichton for subsequent purchases. When the goods went into the store and were in the possession of Blakely, Crichton had an equitable title. After that Crichton went into possession in effectuation of a lien and his possession was interfered with by the defendants, not as trespassers, but under a claim of right. In this case Equity will interfere and will restrain. The bill is simply to restrain an interference with the property of the defendant, who seeks to derogate from his own grant and give a status to Jenkins, on the ground that the grant

was given in fraud of his creditors. The provision for an order in the nature of an injunction in *Revised Statutes*, chapter 95, section 58, is one of the provisions of the Equity Procedure of the Province, and it is open to contention that it has no application to common law suits. It gives the Judge in Equity about the same power that the English Judges exercise under the Judicature Act. The clause applies to both Courts, or at any rate to the Equity Court. (THOMPSON, J.—The clause was originally in the Practice Act, but when the act was passed assigning equity jurisdiction to the Equity Judge, it was properly removed to the Equity Act.) It would be absurd to say that the clause merely gives the Equity Court the power it always had of granting injunctions. For the purpose of argument, admitting that the bill asks for relief which could be obtained in a court of law, this statute enables the Equity Court to grant it. The object of the act must have been to extend the power of the Court; *In re Wood*, 49 L. T., N. S., 275; *Jennett v. Sinclair*, 1 R. & C., 392. Under the prayer for general relief we are entitled to any relief not inconsistent with the allegations in the bill. The bill all through charges fraud on the part of Blakely. The defendant must satisfy the Court that there was after-acquired property in the store, either by answer or affidavit, after the filing of the bill. (THOMPSON, J.—The burden is on you to disclose everything when you ask for an injunction. If there were any after-acquired goods you should show it.) We do not admit it. (RIGBY, J.—Assuming that all the property there was covered, can you sustain the injunction? The bill does not allege that there were after-acquired goods on the premises, and the defendants show the plaintiff had no means of knowing.) The plaintiff being once out of possession and not knowing or having any means of knowing what goods had been taken, both trespass and trover were barred to him. We could not make the affidavit required by law for replevin, nor could the sheriff make the return required. We have not the knowledge to describe them. The defendants say there were goods there which were not covered by the bill of sale. If we take property that does not belong to us we run the risk of paying damages. The test is whether

any other remedy would be full, adequate, and complete. Subsequent clauses can be looked at to control the conveying clause; *Carr v. Allatt*, 3 H. & N., 964. (THOMPSON, J.—My impression is that they can only be looked at where the clause is doubtful.) If a person seeks to transfer property to be acquired in the future, neither courts of law nor of equity will notice it, but the moment the property is ear-marked an equitable right arises. If a place is located to which goods are to be brought, goods which are brought there are ear-marked. (RIGBY, J.—It is not enough to show that the bill of sale mentions a particular place, unless these particular goods were to be brought there. But the bill of sale covers goods all over the world.) One particular place is mentioned and an intention indicated to continue to do business there. When goods come there they are ear-marked. When plaintiff entered and was disturbed in possession, he was entitled to an injunction under the statute; *Revised Statutes*, chap. 95, by which the right to injunction is extended so as to cover this case. *L. R.*, 9 Chan. Div., 89. In that case it was held that what was reasonable and just was the only limit, and that the Common Law Procedure Act extended the jurisdiction of the Court to cover cases where injunctions would otherwise have been refused. (THOMPSON, J.—Your difficulty is that you claim an injunction without reference to any other remedy.) A bill may be filed for an injunction only; *Hilliard on Injunctions*, pp. 2, 296; *Daniel's Ch. Prac.*, 613; *Kerr on Injunctions*, p. 15. Plaintiff is entitled to an injunction because he was disturbed in his possession by a party claiming under color of right; *33 L. J.*, Equity, 451; *Ritchie's Eq. Dec.*, 478, 482. Plaintiff held the goods as a security, Blakely's position being of a fiduciary character; *3 Hare*, 307; *Ibid.*, 303; *2 Phillips*, 382; *2 Grant's Chancery Reps.*, 24; *L. R.*, 12 Ch. Div., 812. The indorsement of a note does not suspend the right to take possession under a bill of sale; *5 B. & S.*, 39; *Jones on Chattel Mortgages*, section 482. The appellant has not taken the ground that the plaintiff acquired a legal title by possession. As to manner of taking ground, see *Windsor & Annapolis Railway*, 3 R. & C., 377.

McCoy, Q. C.—The injunction must proceed on the grounds stated in the bill, and cannot be obtained if the grounds do not justify it. This principle has not been changed or extended in the slightest degree. The law in regard to after-acquired property is laid down in *36 Law Times Reports*, Exch., 168; *4 DeG. J. & S.*, 1; *L. R.*, 10 Chan. App., 322; *L. R.*, 8 App. Cases, 285. In *Moran v. Shelburne Lumb. Co.*, Ritchie's Eq. Dec., 134, an injunction was refused where the title was in dispute. The bill shows no default on the part of Blakely to comply with the terms of the bill of sale; *L. R.*, 3 Q. B., 128; *L. R.*, 4 Exch., pp. 16, 19. Before there could be a default there must be a demand containing an amount then due. Equity will not interfere where the conduct of the plaintiff has led to the condition of things complained of; *1 Hare*, 1; *1 Joyce on Injunctions*, 296, 1035. Irreparable injury applies only to real and not to personal property, but supposing the injury was irreparable, it must be specifically set out; *High on Injunctions*, p. 256. Blakely should be joined as a defendant. (MCDONALD, J.—He has no present interest. RIGBY, J.—As regards Jenkins, he is a mere *cestui que trust*. He has nothing to do with Crichton whatever.)

RIGBY, J., (April 22nd, 1884,) delivered judgment as follows:—

The Bill in this cause, after setting forth that the plaintiff, Peter Crichton, was the assignee of certain chattel mortgages given by the members of the firms of Blakely & Brine and Blakely & Co., to Davidson & Crichton, upon the goods, etc., contained in the premises occupied by the former firms at the corner of Duke and Granville Streets, in this city, and had entered upon such premises in pursuance of the terms of such mortgages, with the consent of John H. Blakely, who then alone represented the firms of Blakely & Brine and Blakely & Co., and had seized and taken possession of all the goods, etc., contained therein and covered by said mortgages, went on to allege: that after the plaintiff was so in possession, the said Blakely executed to the defendant, Thomas K. Jenkins, a deed of all his property and effects in trust for the benefit of the creditors of Blakely & Co., and, about the same time, also

gave to Jenkins a confession of judgment for about \$6,300 ; the said Jenkins at the time having notice of the possession and rights of the plaintiff ; that the defendant, Donald Archibald, as Sheriff of Halifax, acting under an execution issued upon the judgment of defendant, Jenkins, against Blakely, and aided by Jenkins, unlawfully broke and entered the premises above mentioned, and levied upon the goods, etc., of which plaintiff was lawfully in possession under the said chattel mortgages which had been assigned to him, and expelled and intended to keep expelled, the plaintiff therefrom ; that, although plaintiff had possession of the goods for some time previous to such levy, he had made no inventory thereof and did not know the actual quantity or articles upon said premises. The bill then proceeds to set forth in the eleventh paragraph, that the members of the firm of Blakely & Co. "have no means or property of any moment, if any, outside of that covered by said chattel mortgages, and unless the sum and sums which said bills of sale were given to secure shall be realized out of the goods so taken possession of * * the plaintiff will be unable to obtain payment of the said debt or any part thereof, and will thereby sustain irreparable damage and injury ; and he avers that he has no proper or adequate remedy at law for the due protection of his right in the premises." The twelfth paragraph alleges that the goods, etc., covered by the mortgages are largely insufficient to satisfy the amount which they were given to plaintiff to secure, and, if sold by the sheriff under the execution, would be sacrificed. The thirteenth paragraph sets out that the chattel mortgages were assigned to plaintiff to secure him against liabilities he had contracted for the accommodation of the firm of Davidson & Crichton, and for advances made to that firm and represented principally by negotiable paper held by third parties, to which plaintiff was a party, and which was daily maturing ; and that unless plaintiff was permitted to sell the goods, etc., he would be obliged to sacrifice his private property in order to meet said paper ; and, in the following paragraph, it is alleged that Davidson & Crichton were wholly unable to aid plaintiff in meeting such liabilities. In the fifteenth and last paragraph the plaintiff averred his belief

that the assignment and judgment to Jenkins were fraudulently given for the purpose of injuring and defrauding the plaintiff and causing him annoyance and loss, and for the benefit of Blakely, and not for the protection of any creditor of Blakely & Co.

The prayer was for an injunction and for general relief.

Upon this bill an *ex parte* injunction was ordered to issue enjoining the defendants from selling the goods in question, and from interfering with or removing the same, or from attempting to enforce Jenkins' execution, and also enjoining Jenkins from taking possession of the goods under the assignment to him. The learned Judge in Equity having refused to set this order and the injunction aside, the defendant, Jenkins, has appealed to us from that decision. It will be observed that the allegations in the bill, if true, establish that the defendants jointly entered premises of which plaintiff was rightfully in possession, and evicted plaintiff therefrom, and forcibly possessed themselves of goods, etc., belonging to plaintiff; in other words, committed acts of trespass for which they would be liable in an action at law at the suit of the plaintiff, to pay not only the value of the goods, but also such special damage as the latter might establish. It is clear that such a state of things, of itself, would be insufficient to entitle plaintiff to resort to the Equity side of this Court, as there would be a complete remedy at law by the action already suggested; *Davenport v. Davenport*, 7 Hare, 217; *Bert v. Drake*, 11 Hare, 370; *Moren v. Shelburne Lumber Co.*, Ritchie's Eq. Dec., 134, and *Lockhart v. Mott*, decided by the late Judge in Equity but not reported. There are cases of trespass, however, in which Courts of Equity will interfere by injunction, and it is necessary to consider whether plaintiff's allegations bring this action within these. The law is thus laid down in the first edition of *Joyce on Injunctions*, at p. 468:—"An injunction will not be granted to restrain a trespass unless the trespasser is insolvent, or the injury irreparable and destructive to the plaintiff's estate, to its very nature and substance, and such as calls for immediate relief, at least until the right is determined. There must be something particular or special in the case, for which a Court of

law cannot afford adequate redress, and for which, either for difficulty of proof, or some other cause, the party cannot obtain adequate satisfaction in the ordinary course of law." See also *Mason v. Shedd*, N. S. Eq. Dec., 478. The injunction, however, must be founded on the case alleged by the bill; *Daniell's Chan. Prac.*, 5th edit., p. 1468. In the case of *Castelli v. Cook*, 7 Hare, at p. 98, on a motion to dissolve an injunction, the Vice-Chancellor said:—"I have said I feel myself bound to exclude all question about the account, but I am perfectly satisfied that it is not the view with which the bill was framed. The bill seeks relief against Cook on the ground of misconduct, and the relief prayed against him is not relief confined to this point,—that, as a partial shareholder, he can have no right to take away the ship without giving security; but the relief is founded on the allegation that Cook is a large debtor to the plaintiffs, and that until he has rendered an account he ought not to be allowed to go out of the jurisdiction and take the ship with him. That is the case put forward by the bill. Lord COTTENHAM, in *Whitworth v. Gaugain*, (Cr. & Ph., 325,) said, 'that when a party comes on motion to restrain another from doing an act, he is bound to tell the Court what the case is on which he relies; and that when he brings forward prominently and relies upon a given case, the Court will not allow him, if he should fail in that case, to spell out another, and say he might have framed his case so as to show a title to the relief asked.' That was a much more favorable case than this for permitting such a change of ground, for there everything which the plaintiffs asked might have been granted them on the facts as they were stated on the bill. Here, it appears to me, the case is otherwise; for the plaintiffs are asking against Cook exclusively relief to which, as against him alone, they are not entitled on the frame of the bill."

One of the grounds upon which the learned Judge in Equity based his decision was that the mortgages held by plaintiff covered property to be subsequently acquired by the grantors, and that it was, therefore, necessary to proceed in Equity, to get the benefit of the equitable title to it. But, assuming that the description of such property in the mortgages was specific

enough to include the goods subsequently taken upon the premises, the bill shows that plaintiff's title had ceased to be a mere equitable one, for he, under powers contained in the mortgages, and with the consent of the grantor, Blakely, had lawfully become possessed of the goods in question before the assignment to Jenkins or the seizure by him and the sheriff. Another ground upon which the learned Judge upheld the injunction was that it would avoid multiplicity of suits ; that it appeared by the plaintiff's affidavits that only a portion of the goods had been seized by the sheriff under the execution, and the remainder had been taken by Jenkins under his assignment, and that, therefore, at least two suits at law would be necessary. But these facts are not set out in the bill to which we are alone entitled to look, as I have already shown, and which was not controverted at the argument. The statements in the bill are inconsistent with such a conclusion, for it sets out that all the goods were jointly seized by the sheriff and Jenkins, and that, therefore, only one action would be necessary. On referring to the bill it seems clear that it was intended to maintain plaintiff's right to an injunction, by virtue of the allegations in the eleventh paragraph, which I have already set out *verbatim*. The "irreparable injury" suggested in that clause of the bill is to arise if the sums secured by the mortgages are not realized out of the goods in question, because the grantors have no other means of any moment. But a similar allegation could be truthfully made in almost any action of trespass, where goods are taken out of the possession of a person who holds them as security, and is not such damage as the cases contemplate. The same paragraph avers that the plaintiff has no adequate remedy at law but states no other facts on which to found such conclusion. The allegations in the twelfth and thirteenth paragraphs, that if the goods are sold by the sheriff they will be sacrificed, and that unless plaintiff is allowed to sell the goods he will have to sell his private property, it seems to me, do not assist the plaintiff's contention. The former allegation, if true, would be evidence in an action at law. The price which the goods brought at sheriff's sale would not fix the amount of plaintiff's damages, for the plaintiff would be at liberty to

show the actual value of them. It does not appear that a sale by the plaintiff, made in time to furnish him with funds to meet the notes daily maturing, would be more productive than the sale enjoined. Nor can I see how the injunction is going to furnish plaintiff with funds to meet the notes and thus save his private property; it keeps defendants from selling the goods but does not restore them to plaintiff, nor, as far as I can see, will it protect him from any of the consequences of which he complains. The allegation in the latter part of the ninth paragraph, that plaintiff had made no inventory of the goods and did not know the actual quantity or articles upon the premises, falls short of what would be necessary to uphold the injunction. There is no allegation that without the injunction the plaintiff would have no means of showing the quantity and character of the goods, while the inference is that the sheriff could supply him with all necessary evidence on that point. Plaintiff's counsel suggested several grounds upon which he contended the right to the injunction could be supported, to all of which, excepting those already adverted to, it is sufficient to say that it is evident that the bill was not drawn up with the intention of founding the right upon any of them. Mr. Harrington urged upon us that by virtue of section 53 and the subsequent sections of chapter 95 of the *Revised Statutes* relating to injunctions, and which he contended applied to the Court of the Equity Judge, the power to grant an injunction was enlarged to cover all cases in which it would be right or just that it should issue, and therefore to this case; and for this he cited *Beddow v. Beddow*, 9 Ch. Div., 89. I do not think, however, that the decision in that case, taken in connection with the opinions expressed by the Judges in the later case of *Day v. Brownrigg* at p. 307 of 10 Chan. Div., supports this contention. At p. 93 of the former case the Master of the Rolls says: "In my opinion, having regard to these two acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." And subsequently the same Judge was present when

Lord Justice JAMES, in *Day v. Brownrigg*, thought it right to add to the opinion which he had just expressed that "the power given to the Court by section 25, sub-section 8 of the Judicature Act of 1873, to grant an injunction in all cases in which it shall appear to the Court to be 'just or convenient' to do so, does not in the least alter the principles on which the Court should act." The Master of the Rolls added: "It must be 'just' as well as 'convenient.'" If then, the principles upon which the Court was to act were not altered by the Judicature Act, when the power to issue an injunction was for the first time expressly given when it should be "convenient" as well as "just" to allow it, I cannot see how it can be successfully argued that these principles were enlarged by our legislation, already referred to, and which is a transcript of those provisions of the Common Law Procedure Act, to which reference is made by the Master of the Rolls in *Beddow v. Beddow*. Nor can I see that the facts in this case establish that it would be right or just to allow this injunction to stand, while they convince me that the plaintiff's remedy is complete at law, and while "according to sufficient legal reasons" and "on settled legal principles," an injunction would not lie.

I think that the appeal should be sustained, and that the rule *nisi* to set aside the injunction should be made absolute with costs.

JAMES, J.—The defendant's counsel, at the hearing, contended that there had been no delivery of the stock of goods by Blakely to the plaintiff, and produced the affidavits of Blakely and others to that effect. At the argument of this appeal they changed their ground and rested on an allegation in the plaintiff's bill, as an admission that there had been such delivery of possession. The admission or allegation is in express terms, and the plaintiff is bound by it, and the argument has left no doubt on my mind that this delivery was a *novus actus* which converted the plaintiff's former equitable title into a legal title, and gave him a right, and, after hearing the argument, I think a sufficient right, to proceed at law, and consequently, took away his right to maintain

this suit in Equity. I quite concur with my brother RIGBY that whatever change was made in the law by sections 53 to 58 of Chapter 95 of the *Revised Statutes*, the principles on which a writ of injunction should issue, do not give any judge unlimited discretion to issue an injunction. I think the main scope and intent of the act was to give to the Court of the Judge in Equity, by sections 44 to 52 inclusive, under the head of "mandamus," the same powers in relation to writs of mandamus, with some considerable improvements, which had before pertained to the Common Law Courts, and at the same time, by sections 53 to 58 inclusive, under the head of "injunction," to give to the Supreme Court all the powers, with improvements, (for instance the recovery of damages in a suit brought in that Court for an injunction,) which had formerly been within the exclusive jurisdiction of Courts of Equity; in other words, that the "mandamus" clauses refer mainly to the Equity Court and add to its jurisdiction, while the "injunction" clauses refer mainly to the Supreme Court, and enlarge its jurisdiction. But I do not consider that either writs of injunction or mandamus are to be granted otherwise than on principles of law or Equity, established by the Courts, except so far as is plainly indicated by the statute.

I concur in the conclusion at which my brethren have arrived, that the appeal should be sustained and the rule *nisi* made absolute with costs.

McRAE v. CORMIER ET AL.

Before McDONALD, C. J., and WEATHERS, RIGBY and THOMPSON, J J.

(Decided April 22nd, 1884.)

Suit for partition.—When later will revokes earlier.

PLAINTIFF claiming a partition set up a sheriff's deed of the interest of J. LeBlanc which she claimed as heir to her mother. Defendant proved a will made by the mother's ancestor devising the lands in question in such a way as to disinherit her. Plaintiff set up as a revocation of the will a later will, but it was not shown that the later will devised any part of the land claimed in the partition suit, and it contained no clause of revocation.

Held, that there was no revocation shown and the verdict must be entered for defendant (under a rule enabling the court to enter verdict for either party.)

This was a suit for partition of lands, tried before JAMES, J., at Port Hood, June 16th, 1880, when a verdict was entered for plaintiff, subject to the opinion of the Court on the evidence. All the material facts appear in the judgment of the Court.

Graham, Q. C., moved to set aside the verdict entered by consent for plaintiff, citing *L. R.*, 5 Prob. Div., 106; *L. R.*, 2 P. D., 98; *1 Wms. on Ex'rs.*, 163; *L. R.*, 1 P. & D., 57; *L. R.*, 3 P. & D., 153; *L. R.*, 1 P. & D., 57; *Robinson's Eccl. Reps.*, 264; *2 Curtis*, 799.

Henry, Q. C., contra.

THOMPSON, J., (April 22nd., 1884,) delivered the judgment of the Court:—

This is an action of partition, and the plea denies the plaintiff's right to partition. The plaintiff claims under a sheriff's deed, purporting to convey the interest of Juliet LeBlanc, whose mother was a daughter of the common ancestor of the defendants. He proved the death of the mother so as to show that the mother's interest had passed to Juliet by inheritance. The defendants met this by proving a will of the ancestor which disinherited Juliet's mother, and plaintiff's counsel admitted, at the argument, that this will devised the lands in question in such a way as to take the lands away from Juliet's mother, but plaintiff set up, as a revocation of this will, a later will, giving a certain piece of land to Juliet. It was not proved, or even contended, that the land devised in the second will was the land of which partition was claimed, or any part of it, or that the second will in any way devised any of the property devised by the former will. The second contained no clause of revocation and, as far as we can see, was a devise of lands which had been left undevise by the former will, or perhaps had been acquired subsequently to the making of that will. The contention that it was a revocation of the first is, therefore, without any foundation, and the plaintiff has shown no title whatever.

The case agreed upon merely enables us to direct a verdict to be entered for plaintiff or defendants, and we have no choice but to order it to be entered for defendants.

IN RE HATELY.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J. J.

(Decided April 22nd, 1884.)

Administration granted to a debtor of deceased.—Associating husband of next of kin.

THE Judge of Probate granted administration of the deceased to two sisters of deceased and one Shearer, the husband of one of the sisters. On petition of a brother of deceased the letters of administration were cancelled. Among the grounds set forth in the petition of the brother which resulted in the cancellation, it was alleged that the petitioner had not been cited and that Shearer was indebted to deceased on mortgages and otherwise. Other grounds were set forth upon which no evidence was adduced.

Held, that it was not necessary to cite the petitioner when the administration was granted to the next of kin, (of whom the two sisters were a majority), and that there was nothing to prevent the Judge of Probate in his discretion from appointing a mortgage debtor of deceased, and no objection to associating the husband of one of the next of kin in the administration at their request.

Q. Whether the Judge can revoke letters of administration once granted for any reason other than those mentioned in the statute.

This was an appeal from an order of the Judge of Probate for the County of Annapolis, revoking letters of administration of the estate of William F. Hately, granted to one James B. Shearer and others, on the grounds that Shearer was largely indebted to the estate, that one of the persons associated with him was his wife, and the other was incompetent to act, and that all the parties entitled were not cited,—and granting fresh letters of administration.

The letters of administration granted in the first instance were to Isabel Hately and Sarah Shearer, sisters of the deceased, and James B. Shearer, the husband of Sarah Shearer. The letters of administration granted in the place of those revoked were to John H. Hately, a brother of the deceased.

McCoy, Q. C., and Morrison, in support of appeal.—All the parties had an equal right, and the Judge, having exercised his power of selection, his authority was gone. The only authority of the Judge to appoint is under the statute, which must be strictly followed. A next of kin applying for administration is not required, under the statute, to cite his co-next-of-kin. (WEATHERBE, J.—The Judge may have had power to appoint the appellant, but if it was intended to exclude the other, should he not have been cited?) The Judge could not

join all the next of kin. The only case in which there is a right of joining is where the widow and next of kin are joined. The only case where the next of kin are to be cited is where they do not voluntarily either take or renounce administration. One may be appointed without citing the others; *Williams on Executors*, vol. 1, p. 514; *Smith's Probate Law*, 79. (THOMPSON, J.—The only effect of citing them would be to eat up the estate with expense.) Primogeniture gives no right to priority of appointment, but will turn the scales where they are equally balanced; 1 *Williams on Executors*, section 375. The Court will pay attention to the majority of interest; *Ibid*, sections 364, 374. If properly granted, administration cannot be revoked even on the application of the administrator himself, unless some strong ground is shown; *Ibid*, section 514.

Harrington, Q. C., contra.—The question was fully argued *In re Maxwell*, 1 R. & C., 229; *Waters v. Stickney*, 12 Allen, Mass., p. 1. The Massachusetts statute is the same as ours. Letters of administration have been reversed there without statutory authority; *Stetson v. Bass*, 9 Pick., 27, 30; *Waters v. Stickney*, 12 Allen, 1. The question was discussed in our own court in *Kerr v. McLellan*, 3 N. S. Dec., 502. The Judge of Probate must, in some way, pronounce on the qualifications of the next of kin, and exercise his discretion; *Probate Act, Revised Statutes*, (4th Series,) chapter 90, section 12. (THOMPSON, J.—Your difficulty is in saying he must do so, although it may be perfectly plain. I do not wish to be understood as denying that he may.) The words of the 11th section are clear. (THOMPSON, J.—I think the words apply where administration is given to a different class altogether.) Then a person who is altogether unfit may hurry in and obtain administration, and the judge cannot review it. (THOMPSON, J.—The judge should not act in such haste.) The case is within chapter 10 of the Acts of 1881. It was competent to the judge to revoke the decree, because of misrepresentation by Shearer as to his being a creditor. Shearer had no right to be appointed in the first instance. Every party must be cited; *Williams on Executors*, p. 440, note k.

RIGBY, J., (April 22nd, 1884,) delivered judgment as follows:—

Isabel Hately and Sarah Shearer, sisters of William F. Hately, deceased, with James Shearer, the husband of Sarah, applied to the Judge of Probate for Annapolis County on the 12th of April, 1883, to have administration of the estate of deceased granted to them. Their petition set forth that the deceased left, besides his sisters, the petitioners, of whom Isabel was the eldest of the family, two brothers, John, residing in the County of Annapolis, and Isaiah, in the United States. It also set forth that deceased had died at the residence of the Shearers, with whom he had lived prior to his death and that Shearer was a creditor of the deceased for a large amount. Upon this petition administration was granted to the petitioners. On the 20th of September, 1883, the Judge of Probate, upon the petition of John Hately, after citing the parties and hearing them and the evidence, decreed that this administration should be cancelled and administration granted to John. The original administrators have appealed to this Court from such decree. The material statements set forth in John's petition for the cancellation of the administration were as follows:—

1. That Shearer was indebted to the estate of deceased, upon mortgages, in the sum of \$2,200.
2. That petitioner was not cited before such administration was granted.
3. That his sister, Isabel, was not competent to act, (but no grounds for such allegation are set forth.)
4. That Shearer was a poor man.
5. That petitioner had reasons for believing that Shearer was indebted to the estate in addition to the mortgages, and had property in his possession belonging to the estate.

Excepting that John had not been cited before the administration was granted, none of these allegations in his petition were proved at the hearing. The only evidence of Isabel's incapacity was the statement of John in his examination that "we never considered Isabel capable of doing business; she lived with me some eighteen years; she was subject to fits;"

and upon the point of Shearer's poverty he says that he "was considered to be a poor man until within the last six years." And this was also the only evidence on the latter point. No reasonable man, I presume, would conclude that because this witness swore that his sister was considered by himself and others, included under the designation "we," incapable of doing business, and was at some time or other subject to fits, and because Shearer was six years previously considered to be poor, that they were therefore unfit to be continued as representatives of this estate. There was no evidence whatever before the Judge that Shearer was a mortgagor to the deceased. Secondary evidence was given, but without proving that original mortgages ever existed, accounting for their loss, or otherwise laying the foundation for the production of the copies. It is true that certified copies of two mortgages from the books of registry were offered and received, in the face of the objections of the appellant's counsel. I presume these were offered under section 33, chapter 96 of the Revised Statutes, but, as the affidavit required by the latter part of that section was not produced, and as that section says such certified copies are to be received only "in the absence of the original," I have no doubt they were improperly received, and that there was no evidence before the Judge of such mortgage;—not that I mean to be understood as suggesting that even if such proof existed it would be sufficient on which to base the decree appealed from; for I cannot see why a mortgagor could not be selected by the Judge, in the exercise of his discretion, as a fit person for such a trust, considering that the statute provides that he must give a bond in a prescribed form, with two sureties to be approved of by the judge. At the argument I was rather impressed with the contention that John should have been cited before administration was originally granted, but subsequent research has induced me to arrive at a different conclusion. Sub-sections 1 and 2 of section 11 of our statutes, (Cap. 90 R. S.,) expressly require a citation when the widow or next of kin or both do not voluntarily take or renounce administration, and before a creditor is appointed; but there is no provision for the citation of the next of kin as between themselves. The

English statute which provided for the course of administration was 21 Hen. 8, chapter 5, sections 3 and 4, and was in effect the same as ours, in requiring that it should be granted "to the widow or the next of kin or to both" in the discretion of the ordinary; and it was the practice in the English courts, when a party had a prior right, that he should be cited or consent before administration was granted, but when persons were equally entitled, the grant was ordinarily made to the first applicant; see *Dodd & Brooks*, Court of Probate, pp. 400 and 401; *Wms. on Executors*, 8th Edit., p. 454; *In re Barker*, 1 Curtis, 592. It was usual to cite the widow before granting administration to the next of kin, but this was in some cases dispensed with; *In the goods of Rogerson*, 2 Curtis, 656; *In the goods of Anderson*, 2 Sw. & Tristram, 489. And under exceptional circumstances administration has even been granted without citing those who had a prior right; *In re Widger*, 3 Curtis, 55; *In re Buckmore*, 3 L. R., P. & D., 139. Under the statute of Henry VIII., above referred to, it was at one time held that administration once granted could not be revoked; but subsequently it was established that the administration, "though granted to a next of kin, may be repealed by the court, not arbitrarily, yet where there shall be just cause for so doing." *Williams on Executors*, 8 edit., p. 584. See also pages 585 and 586. It was contended that under our statute, which contained no express provision to that effect, the Judge of Probate had no jurisdiction to revoke administration which he had once granted; but I cannot concede this. There was the same absence of enactment in the statute of Henry VIII., and, as was said in *Harrison v. Weldon*, Stra. 911, it is "incident to every court to rectify mistakes they were led into by the misrepresentation of the parties." The same jurisdiction has been held to be inherent in the Probate Court of Massachusetts, by the Supreme Court of that State; *Stetson v. Bass*, 9 Pick., 27; *Waters v. Stickney*, 12 Allen, 1. I have failed, however, to discover in the case at bar any sufficient ground for the exercise of such a power. The sisters of the deceased represented a majority of the next of kin within the jurisdiction, and one of them was older than John. Other things being equal, both these circumstances

are of weight in determining between rival claimants who shall have the grant, and the Judge, having once exercised his discretion with all the facts before him, in my opinion, should not have cancelled the letters, especially in favor of a brother who admits that he was not on friendly terms with deceased. In the court below it was contended that Shearer should not have been joined with his wife in the administration; but under sec. 12 of the Probate Act the Judge had ample power, at the request of the other two, to associate Shearer with them in the grant, and, as coverture is no disqualification when the husband assents, the respondents can take nothing by this contention. Counsel argued before us that Isabel's incompetency having been alleged in John's petition, and the decree appealed from being general in its terms, it must be assumed that the Judge has found such incompetency to exist, and that there was no ground of appeal which would entitle the appellant to say that such contention was unsupported by evidence. It will be observed, however, that the Judge in the decree specifies the grounds which were urged before him, and which do not include the one just referred to; and it seems apparent from the language of that document that his conclusion was arrived at without reference to any such alleged incompetency.

The appeal should be allowed and the decision appealed from be reversed with costs to be paid by John Hately.

WEATHERBE, J.—I concur, but with the greatest difficulty.

THOMPSON, J.—I concur, but with a reservation as to that part of the judgment in reference to the power of the Judge of Probate to revoke letters of administration for other reasons than those mentioned in the statute.

TRACEY v. YOUNG.

Before McDONALD, C. J., and McDONALD, WEATHERS, RIGBY, and
THOMPSON, J. J.

(Decided April 22nd, 1884.)

*Contract.—Rescission.—Evidence to support verdict.—Particulars of demand.—
Instructions to jury*

PLAINTIFF and defendant entered into a contract that plaintiff should take defendant's mill, for a period of five years, put the same in repair, &c., and that defendant should furnish supplies, &c., and pay for all lumber cut at specified rates in the months of July and December of each year. Defendant failed to pay plaintiff a sum of \$890 due him on one of the December settlements, and plaintiff, having demanded the money of defendant's manager, was informed that there was none for him. Plaintiff thereupon said he would have to give up the mill, in reply to which the manager said that that was "what the old man expected." Plaintiff and defendant's manager then went over the books and a balance was agreed upon as due plaintiff, part of which was paid, and for the balance of which the action was brought. In addition to the above there was evidence of a statement by defendant that he wished to get rid of plaintiff, who was getting "played out," and of his instructing his manager to keep \$1000 back from plaintiff.

Held, (WEATHERS, J., dubitante) that there was evidence to support a finding by the jury of a rescission of the contract and a promise to pay plaintiff the balance earned.

Held, also, objection having been taken to the sufficiency of plaintiff's particulars, that the verdict could be sustained under the item, "To amount due plaintiff from defendant for work and labor, and under the common counts \$1181.28."

Held, also, that the Judge was right in instructing the jury that evidence was of no importance of a conversation, after the rescission, in which defendant said he was urging plaintiff to go back to work and plaintiff made no reply.

This was an action brought by plaintiff on a written agreement entered into between plaintiff and defendant, dated February 12th, 1881, by which plaintiff agreed to lease a mill belonging to defendant for a period of five years, and put the same in repair, pay taxes, and saw the defendant's logs to the extent of four million feet a year as required. The defendant, on his part, agreed to pay for all lumber cut at specified rates, to pay for breakdowns costing over \$20, to furnish belts, saws and machinery, to furnish supplies at twelve cents on the dollar above cost and expenses, etc., and to pay plaintiff for cutting the lumber twice a year in the months of July and December of each year. Plaintiff's writ also contained the common counts for work done, account stated, &c. A count was added charging the defendant with a breach of the agreement recited in the first count in failing to make the payments in the months of July and December as agreed upon.

The cause was tried before THOMPSON, J., at Amherst, June 21st, 1881, with a jury.

The material portions of the evidence appear in the judgment of the court.

The learned Judge withdrew from the jury all other matters excepting the question whether the evidence satisfied them that the contract had been put an end to by the mutual consent of plaintiff and defendant, and whether they inferred a promise to pay the balance earned. He described the evidence on this issue as slight, and remarked that if they found affirmatively with regard to these propositions, on the evidence of plaintiff's witnesses, it seemed to him that Mr. Townshend's evidence, that before action defendant said in plaintiff's presence that he was urging plaintiff to go back to work, to which plaintiff made no reply, would not materially alter the case, as the conversation which he referred to took place after the rescission, if any, and was not inconsistent with the plaintiff's present contention. The jury answered affirmatively, and, under the instructions of the learned Judge, brought in a verdict for plaintiff for \$1113.92.

A rule was taken to set the verdict aside and for a new trial.

Borden and Graham, Q. C., in support of rule.—The principal question is whether there is any evidence of a rescission of the contract. There is no mutuality in regard to the rescission; *Hinkley v. Earle*. The mere expression of a wish, not communicated, is not enough. There must be the same consensus that any contract would require; *8 El. & Bl.*, 410. The plaintiff worked from December until April under the contract. The settlement was on the 4th April, whereas the rescission is not alleged to have been made until the 15th April. As to what amounts to a rescission of a contract; *Rackcliffe v. Pierce*, 1 F. & F., 300; *James v. Cutler*, 7 Bing., 266; *Leake on Contracts*, 788, 793. Plaintiff cannot recover on the agreement, as set out, as the money was not due until July; *8 El. & Bl.*, 739. The settlement was an ascertaining of the amount due at a certain time under the contract. Similar settlements had been had in different months of previous years.

Henry, Q. C., contra.—My view is that the question is simply whether there is a rescission or not. The existence of a paper having the features of an account stated would not of itself govern the contract. There was, however, I think, an agreement on the part of the defendant, acceded to by plaintiff to rescind. Whether there was a rescission or not was a question for the jury. A contract may be rescinded in a variety of ways. It may be expressed or implied from acts. Silence in some cases is sufficient; *Leake on Contracts*, 879. It is pretty clear that the defendant, from the autumn down to the time of the rescission of the contract, was desirous of rescinding the contract and acted accordingly. The defendant's nephew acted as general manager, and would himself have power to dismiss the plaintiff. If he had such a power he exercised it. Plaintiff left the mill and Frank Young acceded to it. Here was an agreement acceded to by the duly authorized agent of defendant. Plaintiff asked for money and was told that there was none for him. He said that if he did not get the money he could not go on, and, in effect, that he would throw up the contract. He was told that that was just what they wanted. If the due bill had been given at once the rescission would be complete. The difficulty that meets us is the fact alleged that the bill was given prior to the rescission. The evidence in regard to that is equivocal. The date is not perfectly fixed, and the two may be quite consistent. It is enough that the question is for the jury. If the old contract was rescinded we must recover on the new contract, but both contracts must be read together; *Leake on Contracts*, 788; *L. R.*, 1 *C. P.*, 636. The effect of the account stated and new contract, was to make money presently due, which, under the original contract, would not have been due until a later date. There is no evidence that a settlement had ever been made at a similar time in previous years.

Graham, Q. C., in reply.—Plaintiff cannot recover under his pleadings and particulars on an account stated. It must be declared on and included in the particulars. It will not do to put in a less amount. (McDONALD, J.—That objection should be taken at the trial. It is a matter that could and should be amended.) I don't know that the question was

raised. There is nothing in the charge to show it. Plaintiff, in order to recover, must show that there was a rescission of the contract. It is necessary to do this to get over the condition in the contract postponing the time of payment. He must also show an account stated. He has failed to show either the rescission or the account stated. (McDONALD, J.—It is enough to show a rescission of part of the contract.) There is no evidence of that. The contention is that the whole contract was rescinded. The whole shape of the pleadings and evidence shows that plaintiff was not relying on a rescission of the contract. As to what is meant by no evidence, cites *13 C. B.*, 915; *8 E. & B.*, 262; *3 C. B., N. S.*, 149; *43 L. T., N. S.*, 416. Were the words of plaintiff that he would have to give up the mill and the reply “that was what the old man expected” reasonable evidence of rescission to be submitted to the jury? The statement of defendant’s nephew as to what the old man expected is no evidence of a contract. No authority in himself to rescind is implied in the words. The rescission must be in writing. (*Henry, Q. C.*—That is not in the rule.)

RIGBY, J., (April 22nd, 1884,) delivered judgment as follows:—

Under the terms of the written contract put in evidence by the plaintiff in this cause, the defendant’s liability for the amount claimed would not accrue until the July succeeding the commencement of the action. The plaintiff, however, had declared, not only upon the special contract but also upon the common counts, and the jury have found that the special contract had been rescinded before action, and that defendant had agreed to pay the balance earned under it at the time of such rescission. It was contended at the argument that there was no evidence to support such finding, and, if there was, that it was against the weight of evidence. In considering whether there was evidence of the rescission of the contract, it is not necessary to look for an express agreement to that effect, it is sufficient if there are circumstances from which such agreement can be implied. Lord COLERIDGE in *Morgan v. Bain*, *L. R.*, 5 C. P., 15 on this point says: “Rescission must

be by both parties; either both must have intended to rescind, or one must have so acted as to justify the other in thinking that he intended to rescind. It is clear that the omission to perform certain acts incumbent upon a party to a contract may justify the other party in coming to the conclusion that in point of fact the party guilty of the omission intends to abandon the contract and is himself treating it as abandoned and rescinding it." Under the original contract in this case, the plaintiff agreed to take defendant's mill, &c., and to saw logs and do other sawing and work for defendant, at specified rates, and pay the taxes and certain other sums set out in it, during the period of five years from February 12th, 1881; the defendant agreeing to furnish plaintiff with a reasonable amount of supplies to carry on the contract at an agreed price, and to pay him for the sawing, in the months of July and December in each year. Under this contract plaintiff commenced work in the winter of 1881, and continued in the performance of it until April 1883. It appears by the evidence that defendant had other mills and only visited this one occasionally, and that one Frank Young was the manager of his business at the latter. The plaintiff says on this point: "Frank had charge of defendant's whole business as general manager, defendant having put him there. Frank used to give me directions what to do. Defendant told me Frank was to look after his interests and business." And Ransom, defendant's clerk and surveyor of lumber at this mill, says: "Frank Young had charge of defendant's store at the mill and was defendant's manager generally." In the fall of 1882 Ransom says that defendant told him that he was going to get rid of plaintiff, that plaintiff was played out, and that he would run the mill himself; and he suggested that witness should advise Tracy to work by the day instead of under the contract. He also stated to Ransom his intention to keep back \$1000 from plaintiff and told Frank to do so; in consequence of which \$890 due on the December settlement was retained from plaintiff. Plaintiff becoming dissatisfied consulted Ransom who advised him that if he could not get along he had better leave. The following April plaintiff left the mill, and having demanded money of Frank the latter

said there was none for him. Plaintiff then said he would would have to give up the mill, and Frank replied that that was "what the old man expected." Frank and plaintiff then had a settlement. Plaintiff says that they went over the books and the following memo. was made out by Frank, and given to him.

"Jonathan Tracey,

In account with B. Young.

April 4. To bill rendered.....	\$ 925 53
Contra.	
By bill rendered.....	2511 17
Balance settled.....	<u>\$1585 64</u>

Frank asked plaintiff if this was satisfactory, and on the latter answering affirmatively, the former said he would strike a balance in his book. Afterwards plaintiff was paid part of this balance, and the verdict is based upon the settlement, after allowing the admitted charges and credits which subsequently accrued. The evidence on the foregoing points is uncontradicted, the defendant having called no witnesses at the trial but Mr. Townshend whose evidence is hereafter referred to. Under these circumstances I do not think it can be said that there was no evidence of a rescission, or of a promise to pay the balance determined by the settlement with Frank in April. We have first the intention of defendant to put an end to the contract, as evidenced by his admission to Ransom, his determination to withhold part of the amount due to plaintiff, and the admission of his agent, Frank, to plaintiff, that defendant expected him to give up the mill; then we have plaintiff's concurrence evidenced by his leaving the mill, and, finally, we have the settlement between the defendant (through Frank) and the plaintiff, in April, from which it might well be inferred that the parties contemplated that nothing further was to be done under the contract, otherwise any settlement would have been postponed until the following July when the next payment would become due, and which was the month at which the settlement of the first six months of the two previous years had been made. From this settlement a promise would ordinarily be implied to pay the

admitted balance forthwith. There is nothing upon the face of the paper to prove a contrary assumption, and the inference of a present indebtedness is strengthened by the fact that the statement contains a credit in favor of defendant of his account against plaintiff, which, for all that appears to the contrary, was then due and payable, from which it would appear that the balance due plaintiff at the time of the settlement was intended to be ascertained. In *Leake on Contracts*, at p. 122, the author thus states the law regulating such a settlement: "Where an account is stated between two parties respecting items on both sides, importing an agreement to set off the items on one side against the items on the other and to leave the balance only due, such agreement is equivalent to payment and extinguishes the debts to the extent of the set-off, and the discharge of the cross demands is a sufficient consideration to support the debt for the balance." The question being, therefore, properly before the jury, I think the conclusion at which they arrived was a reasonable one upon these facts. It is true that they might have concluded that the defendant's object was to induce plaintiff to abandon the contract, without himself doing anything that would be sufficient evidence of consent, so that he could place plaintiff at the disadvantage of having violated the contract; but such a conclusion would not be as consistent with the facts as that at which they have arrived. I am therefore of opinion that this verdict was not against the weight of evidence. It was said that the particulars of demand were not sufficient to cover this verdict, but I think it can be sustained under the last item, "To amount due plaintiff from defendant for work and labour, and under the common counts, \$1131.28." The only other point relied upon by the defendant at the argument was that the learned Judge "was wrong in saying to the jury that the evidence of J. M. Townshend was of no importance, because the contract, if rescinded at all, was rescinded before the conversation said J. M. Townshend testified to took place." This is the way the ground is taken in the rule *nisi*, and the report of the charge shows that the instruction in reference to the evidence of Mr. Townshend was materially as set out in the rule. I cannot concur that this direction is in any

respect objectionable. If the contract was rescinded, such rescission took place before such conversation and it was not inconsistent with the new contract that the defendant should urge plaintiff to go back to work and that the latter should make him no reply. The Judge, however, did not withdraw the evidence from the jury, but merely expressed his opinion on its materiality.

The rule for a new trial should be discharged with costs.

WEATHERBE, J.—As the defendant is entitled to my opinion, however wavering it may be, I may say that the authority from the defendant to the manager to rescind the contract is scarcely made out.

BURNHAM v. DAVISON.

Before McDONALD, C. J., and McDONALD, SMITH, WEATHERBE and RIGBY, J J.

(Decided April 22nd, 1884.)

Possession.—Occasional acts of ownership.—Accretion.—Justification as commissioner of dykes.

PLAINTIFF brought action against defendant for cutting a trench across his land to carry off water from dyked land to the Avon River. Defendant justified as a commissioner of sewers, but the justification broke down, as it was found that the trench was new work and no agreement had been come to as required by R. S. cap. 40, sec. 4. Plaintiff's possession on which alone he could rely consisted of cutting every year, by himself for five years and by his devisor for eight or nine years previously, the wild grass growing on the land in question between the ebb and flow of the tide, the land claimed by him having been marked off by stakes one of which was permanent and the others replaced from time to time as removed by the tide. The Judge directed the jury that the plaintiff's possession was not in his judgment such as to support trespass and left to them two questions relating to the defendant's justification which the jury answered in the affirmative finding a verdict for plaintiff.

Held, that the plaintiff's possession was sufficient to support trespass, that the verdict settled the issue as to possession in favor of plaintiff, and that, if not, the defendant could not ask for a new trial in order that the jury should pass upon this question, the only grounds in the rule being that the verdict was against law and that the plaintiff had no title by deed to the land to which that claimed was an accretion.

This was an action of trespass tried before Mr. Justice SMITH, at Windsor, May 30th, 1882. The trespass complained of was the cutting of a trench or canal across certain salt marsh in the river Avon outside the running dyke at Falmouth. The defendant in his pleas denied plaintiff's possession and the commission of the trespass alleged, and

justified as a Commissioner of Sewers for the Township of Falmouth, under Chapter 40 of the Revised Statutes, (4th Series.) alleging that the cutting of the trench in question was necessary for the preservation of the dyke and aboiteau. The evidence in regard to the character of the land and the nature of plaintiff's possession is fully set out in the judgment of the court. At the trial the learned Judge explained to the jury the nature of the action and pleadings and told them that he did not see that the plaintiff had established any documentary title to the locus where the cutting, the alleged trespass, was committed; that plaintiff had to rely on two grounds to sustain his action, namely, possession and accretion of soil as appurtenant to his title by deed; that the evidence of acts of possession was not of that satisfactory character which alone would give him title, but his right to the accreted soil was a question of some nicety which he should reserve for the consideration of the full bench. He left the following questions to the jury:—

1st. Was the trench dug by defendant which is the alleged trespass new work?

2nd. Was the work which the defendant did in connection with the dyke extensive work, and would the attendance of all the proprietors have involved unnecessary expense?

The jury answered both questions in the affirmative, and found a verdict for the plaintiff, damages ten dollars.

A rule was taken to set aside the verdict as against law and evidence and for a new trial, and was argued February 26th, 1883, before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J. J. No decision was given, and the cause was re-argued before the same bench with the addition of McDONALD, J., March 4th, 1884.

Henry, Q. C. and Ouseley, in support of rule.—Our main grounds are that there was a justification under the statute, defendant being a commissioner of sewers, and that there was no proof of title or possession in the plaintiff; *Revised Statutes*, 4th Series, chapter 40. The digging of a small drain to let off water is not new work within the meaning of the statute, and the jury were wrong in finding it to be such. If

not, in some cases hundreds of proprietors would have to be summoned before a ten foot drain could be dug. Where work is not extensive the commissioner may do it without summoning all the proprietors. (RIGBY, J.—The only right the defendant had in the land was as a commissioner. If he had no right as such, the only question is whether the plaintiff had such a possession as would enable him to maintain trespass.) There is very little evidence of a cutting at the point where the trespass is said to have been committed. He may have cut once or twice. (WEATHERBE, J.—If that amounts in law to an immediate and present possession the plaintiff should have his verdict. McDONALD, C. J.—I understand that there has been a continuous and uninterrupted possession for twenty-three years as clearly marked as if it was bounded by a stone wall.) Fifteen years ago the point where the ditch was cut was not above water.

Borden, contra.—The answer of the jury to the first question put to them as to whether the work was new work or not settled the case. The answers to the other questions are irrelevant. The other questions were put to the jury in the event of their answering the first question in the negative. We cannot be prejudiced by the jury answering questions they are not called upon to answer. Even if the jury had answered the first question in the negative the verdict would have had to stand as the jury have found that the work was extensive and the commissioner cannot go on even with old work where it is extensive without summoning the proprietors. (WEATHERBE, J.—They could not have understood the question. They found that the work was extensive but that it was not necessary to summon the proprietors.) It must be presumed that they understood the questions. Where work is new it makes no difference whether it is extensive or not. The section in reference to new work contemplates drainage. We have sufficient possession to maintain trespass; *3 C. & P.*, 610; *4 Allen, N. B.*, 521; *McDonald v. Lane*, 7 Sup. Ct. Canada, 462; *Waterman on Trespass*, vol. 2, p. 454, citing a Vermont case; *Taylor on Evidence*, (edit. 78,) 140, 142, 143; *James' Reports*, 246.

Henry, Q. C., in reply.—Mere acts of trespass will not give possession. The strongest case in favor of the plaintiffs' contention is that cited from 4 Allen, N. B. Reports. A mere act of ownership on wilderness land, not referable to a claim of title, gives no right of action against others exercising similar acts. Even if the land in question were meadow land the cutting of the meadow grass would give no title to the land; *Wells on Law and Fact*, p. 80. The question as to whether work is new or old is one for the court, and on this point there has been no finding. The cutting of the ditch was done for the purpose of benefitting the dyke land, and so comes within sec. 19 of the Act.

MCDONALD, J., (April 22nd, 1884,) delivered judgment as follows:

The land upon which the trespass in question in this cause is alleged to have been committed is a salt marsh lying outside of a dyked marsh, in the township of Falmouth, and between the dykes and the river Avon. It has been formed within the last forty years, or thereabouts, by an accumulation of mud gathered there from time to time, in front of the plaintiff's land, and extends southwardly and westwardly. It has been staked off for many years on the north-east, designating the division line between that part of it claimed and used for cutting grass by the plaintiff, on one side, and his neighbour, Church, on the other. It was bounded on the north-west by the running dyke; on the north-east by the stakes mentioned; and on all the other portions of it by the Avon river, and a certain creek called the Windmill creek. After the mud had sufficiently accumulated grass began to grow, which was cut by the plaintiff's brother, George, now deceased, for years. George died five years before the trial, which took place in May, 1882, having first made his will, by which he devised to the plaintiff all his landed property that he died possessed of. The stakes were there since about 1855 or 1856, one of them being a solid permanent one, and the others, if carried away, being replaced, from time to time, by new ones, taking the solid stake as a guide. The plaintiff and his brother, on one side of these

stakes, and Church on the other, cut the grass year after year, or allowed others to do so for a consideration, but the precise locality of the ditch, the cutting of which is the alleged cause of action, although within the limits mentioned, does not appear to have yielded grass worth cutting till about thirteen years ago; one witness says seventeen. Since that time the plaintiff, either for his brother or for himself, cut and took away the grass growing there or permitted others to do so. The defendant, who was commissioner of sewers, and acting as such, undertook to cut the ditch in question through the property for the purpose of carrying away the water from the dyke, alleging that the means formerly used were inadequate for that purpose; and, although the pleadings raise many issues, we are not called upon to decide but two questions, one being whether or not there is evidence sufficient of possession to entitle the plaintiff to recover as against a wrongdoer, having no title, and, if so, whether the defendant was such. At the trial he disclaimed any right personally, but sought to justify the cutting of the ditch as commissioner of sewers, claiming that the work came within the first part of the 4th section of chapter 40, Revised Statutes, which authorizes a commissioner to build or repair dykes, &c., and that it was not new work within the meaning of the last part of that section, which says that, "in case of the commencement of new work, two-thirds in interest of the proprietors of the land shall first agree thereto." It is admitted that there was no such agreement, and, in answer to a question submitted to the jury by the learned Judge, they answered that the work was new work. I must confess that I cannot see how they could have found otherwise, and, if they did, I am inclined to think that such finding could not be upheld. Besides, I think that the work of cutting that ditch is not that contemplated by the statute, so that, if I am correct in that view, the only question for our consideration is that of sufficient possession in the plaintiff. Throwing aside for the present the question as to whether or not the plaintiff entered under color of title, no case has been cited, and I have found none since the argument decided in this or any of the other Provinces of the Dominion precisely in point with one

exception hereafter noticed. In *Cameron v. McDonald*, Thom., Rep. 240, it was held that where plaintiff brought trespass for cutting wood he must show an actual possession, or that the land is within the boundaries described in the documentary title, even although the lines had been marked and run for him by a surveyor, and although he had cut timber on it, both before and after his deed, and had the lines run ostensibly as those of lands which years previously, he had purchased from one Fraser, whose deed did not, however, convey to him the lands where his lines were run. But *Lane v. McDonald*, 7 Sup. C. Can, 462, if I understand the case aright, overrules this view of the law, because there, although there was a semblance of title to some undefined lot, it did not appear, and could not be made to appear, that the land upon which the logs in question were cut was within any boundaries mentioned in the deed, or within the lot named, which deed, therefore, was valueless to define or indicate the land of which constructive possession was sought to be established. Neither the one deed nor the other was shown to have covered the lands in question. In this case the plaintiff proves that he mowed for one Young thirty years ago on the adjoining part of the same salt marsh now owned by Church on the northeast, and first mowed for his brother on the land in question or part of it in 1855 or 1856. He says that he cut grass thirteen years ago where the ditch now is and over it, and adds: "The stakes I cut by up to Church's land were there when I went there thirteen years ago." Church also proves the existence of the stakes as a boundary between the lands claimed by him and by the plaintiff, respectively, for many years, and whatever the legal effect may be, the evidence leaves no doubt that George Burnham first, and after his death the plaintiff, had the only possession and exercised the only acts of ownership over the whole of the marsh within the boundaries mentioned up to the stakes, including the spot on which the ditch was cut, of which it was capable, since the grass was worth cutting on the same. In this respect the condition of things in this country being so dissimilar to that in England, we cannot, in the present enquiry, derive much assistance from the adjudication of English courts; but it is

different if we turn to decided cases in some of the United States, whose circumstances are more like our own, and if we are at liberty to be guided by them. In *2 Waterman on Trespass*, sec. 294, it is said: "One may have constructive possession of land without paper title, and without the literal *possessio pedis* upon any part of the land. It should, however, be marked by unmistakeable *indicia* of right to control. A fence is always enough for this purpose. A mere marked line has not, of itself, been held sufficient. But in the absence of all paper title probably it might be so made as to be equally indicative of claim of title without any monument. *Chandler v. Walker*, 1 Fost., was an action for cutting and carrying away a quantity of timber from the land known as lot No. 6. The plaintiff produced no paper title, and showed no legal right of ownership to the property, but stood solely upon his possession. It appeared that lot No. 6 was northerly of lot No. 7, the plaintiffs' building being on the latter. On the north side of No. 6 was an ancient spotted line. The easterly part of that lot was cleared up to and along that line, and a fence made as far as the clearing went. This clearing was occupied as a pasture. The southerly part of the lot was cultivated, and the north-westerly part, where the trespass was committed, was wood and timber land. The plaintiff had occupied that part of the lot for thirteen years, up to the spotted line, as a part of his farm, as a wood and timber lot. The lot was not enclosed on the north, except at the easterly end where the pasture was, but it was occupied, for all the ordinary purposes of a farmer's wood lot up to a definite and known line. The following instructions in the court, below were held correct: That if the jury found that the plaintiff had been in possession of *locus in quo* for the preceding thirteen or fourteen years occupying it as a part of lot No. 6 up to the spotted line, and as a part of his farm, and as a wood and timber lot attached to and belonging to the same, it would be a sufficient possession to maintain trespass against those who showed no title or possession, or right of possession, as was the case with the defendants, and that it was not necessary for them to find that there was a fence upon the whole length of the spotted line." Again the author says:

"An alleged trespass consisted in carrying away a quantity of stone from a small lot containing about three quarters of an acre. The lot which belonged to the plaintiff was not enclosed, improved, cultivated, or used for any purpose. The part where the trespass was committed was incapable of being used in any way on account of the stone; but on the residue of the lot there were two buildings used as a blacksmith's shop and a storehouse. It was held that the possession of the buildings gave the plaintiff a constructive possession of the whole lot, and rendered the production of a paper title by him unnecessary." He cites *Brown v. Mayors*, 7 Wend., 495. In a note to sec. 919 *Waterman* says: "It is now well settled that possession of a portion of a lot of land, claiming the whole, gives color of possession which, in construction of law, is possession itself, and that, to produce the effect, it is not requisite that the claim should be by deed recorded in the proper office, or that it should be even by a deed containing all the statute requisites to convey land. It is enough that it be in writing capable of being produced on request, or even that it be distinctly indicated upon the land by unequivocal monuments which would not fail to attract the attention of counter claimants." (REDFIELD, C. J., in *Swift v. Gage*, 26 Vt., 224.) In sec. 909 the author says: "Where the plaintiff proved that at different times for more than twenty years he had cut firewood and timber on the premises for his own use and for sale, that he had claimed title to the land, and that he had allowed some persons to cut wood there and forbidden others, it was held that enough had been shown to maintain the action against one who showed no title;" and he cites *Kilborn v. Reivee*, 8 Gray, 415. In section 10 he says: "Although improvements be not extensive or valuable, yet if they are such as indicate an intention to reduce the land to possession for the purpose of actual and permanent occupation they will constitute possession; and the use of timber land for a long period for fuel, fences, etc., has been held sufficient to enable a party to maintain trespass for encroachments." And in sec. 913 he says: "The plaintiff's possession by enclosure need not be shown,—the fact that he has exercised acts of ownership is sufficient;" citing *Wood v. Banks*, 14 N. Hamp., 101;

Tyson v. Shincey, 5 Mo., 540, and *Sawyer v. Newland*, 9 Vt., 383. In *Power v. Howie*, 6 Allen N. B. Rep., 210, the plaintiff brought trespass against the owner of land claiming title by possession over twenty years. The only possession proved was cutting hay annually on a wild meadow part of defendant's land which was not fenced, and on which plaintiff did not live; verdict for the defendant by direction of the Judge. On argument of a rule to set it aside, J. A. Street, for plaintiff, said: "Plaintiff took all the possession he could of such land, cutting grass upon it for upwards of twenty years." RITCHIE, J.—"You are quite right if there had been no title shown on the other side." The court held that as against title the possession was not sufficient. It is evident, however, that the cutting of hay annually on the locus would in that case have been held sufficient, if, as in this case, no title had been shown by the defendant. See also *Morrison v. Alpin*, 1 Kerr. N. B. Rep., 650, and *Smith v. McKenzie*, James N. S. Rep., 228. Up to this point the observations which I found necessary to make would apply if the argument urged by counsel be conceded, that the law which has been held in this Province applicable in cases of occasionally cutting trees on wilderness land is that which controls this case. That, however, I do not admit, as there is considerable difference between occasionally cutting down a tree in a wilderness and taking the whole crop off the land in dispute in one season, and continuing to do so for a series of years in succession. Moreover, it should not be forgotten that the plaintiff's evidence is uncontradicted, when he says that "his brother George, now deceased, died in the possession of the dyke land marked as Burnham and the salt marsh," about five years before the trial, which was in May, 1862, and that, before his death, he made his will, in which we find the following: "I give and bequeath to my brother, William Burnham, all my landed property that I die possessed of, all bonds, etc." Thus, we find that there is a color of title here, at least as good as that in *Lane v. McDonald*, if not better. In *Lane v. McDonald*, although there was nothing to identify the lot in question as lot No. 315 mentioned in the deed, and although there was no such possession as would be had of cultivated

land, yet it was held by Mr. Justice STRONG that it would have conferred upon the plaintiffs a title under the statute of limitations, and that when they took possession of a part under what they claimed to be a paper title, they were constructively in possession of the whole lot, so as to enable them to maintain the action. This case is much stronger in favor of the plaintiff, because he not only shows the will and the possession of his brother, under whom he claims, and possession of part of the lot for a period far exceeding twenty years, but he also shows what I think would be sufficient to entitle him to recover independently of the question of constructive possession against one who shows no title—namely, as actual, absolute and continuous possession for thirteen years at least as could be had of the very identical spot where the defendant made the ditch by cutting, year after year, the grass growing on the same during that period of time. And when Andrew Shaw, a witness for the defence, testifies that at the request of his father he cut one year one load of grass on the locus marked green, on the plan, in 1855 or 1856, close to the running dyke north-east of where the trench now is, and, without showing any right, says, “we cut to break the plaintiff’s claim of possession,” he strengthens, instead of weakening, the plaintiff’s case, as he proves that even so long ago as that the plaintiff’s claim of possession was well known in the locality. There is but one other point to which I think it necessary to refer. At the trial the learned Judge told the jury that the evidence of acts of possession was not of that satisfactory character which alone would give the plaintiff title; and it was intimated at the argument that for that reason there ought to be a new trial, so as to take the opinion of a jury upon that question. If the verdict had been the other way that objection would be open to the plaintiff; but I fail to see why the defendant should complain. The jury evidently thought differently from the learned Judge, and, in finding a verdict for the plaintiff, must have found the question of possession in his favor. And, besides, that ground is not taken in the rule *nisi* to set aside the verdict. The only grounds taken are that the verdict is against law and evidence and the ground taken on motion for non-suit,—the

latter only being that the plaintiff had no title by deed to the land outside of the dyke.

The rule *nisi* should be discharged with costs.

RIGBY, J.—I concur in the opinion just read.

MCDONALD, C. J.—I also concur. This was an action of trespass *quare clausum fregit* tried before my brother SMITH at Windsor. The land on which the alleged trespass was committed is a piece of salt marsh on the river Avon in the township of Falmouth. It lies outside of the running dyke which encloses the dyked marsh in that locality, and was being formed in course of time by accretion, commencing in front of the plaintiff's land, and extending southerly and westerly therefrom, and divided from the dyke in front of defendant's land by a brook or stream called Windmill Creek. It is admitted that plaintiff established no documentary title to the land in question, and he must rely on the possessory title proved on the trial. It was strongly contended at the argument that the plaintiff had failed to establish such a possession as would enable him to recover. It is unnecessary to transcribe the testimony of the plaintiff and his witnesses on this point. In my opinion it establishes a continuous and exclusive possession of this piece of marsh for many years past. Indeed, with one solitary exception, it does not appear that for over twenty years any one attempted to intrude on that possession while the plaintiff and those under whom he claimed annually and under the usual and ordinary course of dealing with such property manifested their occupation and possession and claim of property by cutting and taking the hay from the land, enlarging their operations year by year as the area of the marsh expanded by accretion. This land, so claimed and occupied by the plaintiff, was marked and defined on the north-east by stakes designating the line in that direction between the plaintiff and his neighbours, and on all other sides by natural boundaries formed by the river Avon and the creek before mentioned. These boundaries and the occupation before mentioned manifested an appropriation and possession as complete as if the plaintiff had surrounded the property by a stone fence. It

would appear that at one time the defendant made some pretension to a portion of this marsh, but on the trial he repudiated any such claim, and rested his defence on the facts set out in the 13th plea, which alleges a justifiable entry by the defendant as commissioner of sewers for that district. Chap. 40, sec. 4, Revised Statutes, provides that "the commissioners, (appointed under the Act,) may require the proprietors of such lands to furnish men, teams, tools, and materials, to build or repair any dyke or weirs necessary to prevent inundation, to dam, flow or drain such lands, or to secure the same from brooks, rivers, or the sea, by aboiteaux or breakwaters, or in any way they think proper, for the erection of fences to protect the same ; and, in case of neglect, may provide tools and materials for that purpose at the expense of such proprietors." The defendant is admitted to have been at the time a duly appointed commissioner of sewers for the district of Falmouth, and he had, by virtue of his authority as such commissioner, summoned the proprietors to make necessary repairs upon the running dyke within his jurisdiction, and while so engaged and with the persons so summoned by him cut the ditch or drain on the marsh land above referred to, and then in the possession of the plaintiff. The statute above cited also provided that "in case of the commencement of any new work two-thirds in interest of the proprietors of lands shall first agree thereto." The learned judge put it to the jury whether, as a matter of fact, the cutting of this drain was in the understanding of persons acquainted with the mode of treating dyked and marsh lands "new work," as contemplated by the statute, and they have found in the affirmative. The authority of the defendant to undertake new work without the assent of the proprietors was denied by the pleadings. The intention of the legislature in this act would appear to be to empower the commissioners of sewers to act in making ordinary repairs, or in any sudden emergency, without consultation with, or the consent of the proprietors, but that these proprietors should not be taxed for the construction of any new work not immediately essential to the preservation or interests of common property without their consent to such work being first obtained. This is

certainly a reasonable reading of the act and, as the present defendant entered upon the plaintiff's property to perform this new work without the sanction of the proprietors first obtained, I think he cannot justify the trespass under his commission. I also fail to discover in the act referred to any authority to the commissioner of sewers to enter upon the lands of the proprietors to construct drains or take material without permission first obtained.

The rule *nisi* will be discharged with costs.

WEATHERBE J.—To this action of trespass there were pleas of justification under the statute which provides for the repairs to dyked lands in the province. Two issues were submitted to the jury respecting this justification, which are to be considered under the evidence in the light of the statute. The plaintiff, as commissioner, is authorized, where repairs are not extensive, and the attendance of all the proprietors would involve unnecessary expense, to use discretion in employing men; but, if the labor is required for "new work," the consent of two-thirds of the proprietors is necessary. Two questions were left to the jury, as explained by the judge's directions: "I explained to the jury the nature of the action and pleadings, and told them I did not see that the plaintiff had established any documentary title to the locus where the cutting, the alleged trespass, was committed; that he had to rely on two grounds to sustain his action, namely, possession and accretion of soil as appurtenant to his title by deed; that the evidence of acts of possession was not of that satisfactory character which alone would give him title; but his right to the accreted soil was a question of some nicety which I should reserve for the consideration of the full bench. I left the following questions to the jury: '1st. Was the trench dug by the defendant, which is the alleged trespass, new work? 2nd. Was the work which the defendant did in connection with the dyke extensive work, and would the attendance of all the proprietors have involved unnecessary expense?'"

We heard much discussion as to what constituted "new work" and "extensive work;" and Mr. Ouseley for defendant

took the ground that the jury had not disposed of the matters submitted by the judge under the pleas of justification. All the questions put are answered in the affirmative, and it seems to me evident, from the mode in which the jury dealt with the case, under the direction of the learned judge, that this was regarded as a case where, if the commissioner had followed the directions of the statute, he would be justified; or, in other words, it was not regarded (whatever we may imagine) as a case, as was contended by plaintiff's counsel, where defendant was abusing his office of commissioner to interfere with plaintiff's rights. But, I think, if, as seemed to be the most correct view, "new work" refers to reclaiming land from the sea, that the first question was wrongly answered. The difficulty arising from that which is numbered as the 2nd question is that there are two questions, and, from the reply of the jury, we must suppose that they understood that the work was extensive work, which seems to be unsupported by the evidence, and that it was unnecessary to summon all the proprietors, which, though in favour of the defendant, is contradictory to the answer applied to the first branch of the 2nd question. I think, therefore, that there is much in the argument of defendant's counsel that the question of justification is undisposed of, though I am to be considered as resting my decision on other grounds. The learned judge seems to be of opinion, and directed the jury, that the plaintiff's acts of possession were insufficient, under the circumstances, to entitle him to succeed in any event, unless he was entitled to accreted soil. Counsel did not urge an argument in favor of title by accretion, and I think plaintiff cannot, under this evidence, make out such a title, because he did not make out title to the strip of land outside the dyke on which the accretion took place. If the learned judge was wrong as to the acts of possession, that question should have been left to the jury, and should now be sent for trial, for, I think, we would hardly undertake to try that now. But can it be said that he was wrong? Has the plaintiff made out sufficient right against a wrong-doer to entitle him to succeed?

Plaintiff claims title to the bed of the Avon, a navigable river, and here, once a year, for a short period, between the

ebb and flood tide, he has sometimes cut the salt grass, the roots of which increase, and support a growth which goes on under the salt water, which flows in from the Bay of Fundy, and in the air when the tide is out. There is perhaps some evidence of a cutting of this peculiar grass on the very place where plaintiff undertook to dig a ditch in the bed of the river to let off the accumulated water from the dyked lands above. The evidence is not at all clear as to this point, but it is admitted that the possession was only for the purpose of cutting this wild marine or salt grass, and it was not denied that it was necessary to go on the mud between two tides to effect this purpose. It is obvious, indeed, that the dykes which are above the bed of the river are necessary to prevent the sea from flowing over the reclaimed meadows within. It is also admitted that the defendant was not at the time of the cutting of the ditch actually interfering with plaintiff, whose temporary and brief operations were carried on at a different time of the year. It could hardly be urged that plaintiff could gain such a possession in the channel of a navigable river as would entitle him to interfere with navigation or with operations for the improvement of navigation. There is no pretence of a continuous adverse possession under the statute. The ground upon which plaintiff must succeed is, that, being in actual, or what is equivalent to actual possession, without title, he cannot be disturbed by a wrong-doer. He must, therefore, show that he was either in actual possession by being, through himself or others, on the premises, and disturbed in such possession, or that he had the premises surrounded and enclosed in such manner as to be under his control, so as, in law, to be considered in his actual possession. The only English case cited was that of a house which plaintiff, though not in it at the time, had locked; but it is obvious that this was not in point. The law as decided in some of the United States was relied on, but in no State have the courts gone so far as we are required to go. Some stakes that were temporarily driven for the purpose of ascertaining where to cut the grass, but would be carried away by the tide, or most certainly by the ice, were referred to as indicating a possession equivalent to that of a house where

The tenant without title, being absent relied on locking the door. In the present instance a question was raised whether, even if it were physically possible to enclose the premises in dispute in any way to indicate the limits by which possession could be claimed, an enclosure sufficiently substantial to resist the force of the tide from the sea, or the drift ice from the river, would not be an obstruction to navigation, and the case of *Essex vs. Wood*, decided on appeal in the Supreme Court of Canada, was referred to. We have not yet received an authentic report of the opinions of the learned judges in that case. When that case was before this court no contention was raised as to the obstruction of navigation. Plaintiff and defendant both claimed by grants from the crown of the same part of the foreshore; and though defendant's counsel distinctly informed us he did not intend to question the right under which plaintiff received his grant, on appeal a new question was raised as to the obstruction of navigation, and that the crown had no right to grant for the erection of a wharf; and it was held that plaintiff had obstructed the navigation by driving piles in the land covered by tidal waters of the harbor, which defendant removed. When this case was before us it did not, I think, appear that defendant had any better right than arose from the use by himself of a wharf which equally obstructed navigation, and for the erection of which there was no better authority than that which plaintiff was disturbed in exercising. Plaintiff had actual, open, visible, and absolute possession; but, being in possession of the shore of navigable water, it was said that the court decided, though the defendants had no better rights to adjoining premises to which he sought to bring vessels, that he was justified in destroying the plaintiff's erection; and it was not contended by counsel that that appeal could have been determined on any other theory. How then could plaintiff in this case be justified in closing the disputed bed of the river or in establishing any erection which would be at all similar to the house left locked by the absent tenant, which the law regards as against a wrong-doer to be in the possession of such tenant without title.

I can understand the principle upon which such a case is

decided ; but, if mere temporary use for a few hours " between tides " once a year, for a transitory purpose of such a marine place as the bed of the Avon river can be considered sufficient without color of title, (for the conveyance or will did not even profess to describe the locus, or any part of the river bottom), then a possession upon upland wilderness entirely unenclosed, temporary occupation for one day, or a few hours of the day within a year would justify an action as for a disturbance of that possession, though, in point of fact, the act complained of should be committed months after the temporary and transitory use of the same territorial area. The case was suggested on the argument, of the extensive unenclosed plains which surround Halifax. An industrious colored population annually gather here the natural wild fruit of the region for sale in our markets. Would such a transitory enjoyment, not amounting to continuous occupation, which might perhaps ripen into user, justify an action against one who might disturb some of the wild fruit-bearing plants by draining across the unenclosed space ? Can we settle the case in hand upon any principle of law which would not go to the full length of establishing a right of action in the instance mentioned, or in many other cases where the wild nuts or berries of the uncultivated woods or plains of the country are annually gathered ? I am unable to define such a rule. I am led to think, with all deference to the views of some of my brethren, that if we are to hold that plaintiff can recover we are making new law. No authority, it appears to me, has been cited to indicate in any way upon what basis we shall establish such law. If plaintiff is to recover here I cannot see how it was the plaintiff in *Barnhill v. Peppard*, (3 N.S. Dec., 491), failed, considering that he proved forty years' continuous exclusive enjoyment of a well defined though unenclosed wood lot. Though naturally strongly influenced by the opinions of my brethren, I think that the learned judge was right in instructing the jury that plaintiff had not made out the possession required to support the action, and, therefore, that the rule *nisi* should be made absolute with costs.

SMITH, J.—I concur in the judgment read by my brother Weatherbe. I cannot comprehend how parties going on a

piece of land such as this, annually, and merely removing the grass, can acquire such possession of the soil as to enable them to maintain trespass. If that is the law of the land a party by going upon an island in Bedford Basin, or elsewhere, and picking berries once a year, though he does not go there again during the year, or perhaps for two years, can obtain a possession which will justify him in bringing an action. I think the plaintiff had no possession sufficient to maintain trespass even against one who has no title or possession.

WHITMAN v. THE WESTERN COUNTIES RAILWAY COMPANY.

Before McDONALD, C. J., and SMITH, BIGBY, and THOMPSON, J J.

(Decided April 22nd, 1884.)

Negligence of carrier.—Injury to goods before the journey.—Limitation of actions arising from injury by railway.

PLAINTIFF delivered a planing machine to defendants to be carried between two stations. In placing it on board a car for that purpose defendants' servants injured the machine by negligence or want of proper appliances.

Held, that defendants were liable notwithstanding the special contract that the machinery was to be carried at the owner's risk.

Held, also, that this was not a suit "for indemnity for any damage or injury sustained by reason of the railway" under sec. 26 of the N. S. Railway Act of 1880.

This was a rule to set aside a verdict for plaintiff in an action for negligence in the handling and moving of a planing machine which had been delivered to defendants to be carried from Yarmouth to Hectanooga, and there delivered to the plaintiff. The machine in question was brought by plaintiff to the defendant company's railway station at Yarmouth, and placed on the platform under the directions of one of the company's servants. On the following morning, while the machine was being placed on a car by employees of the company, in consequence of failure to use proper care, it was dragged over the car and thrown to the ground on the opposite side, and broken. It was afterwards repaired at the company's expense and delivered to the plaintiff, but with its value and capacity

both reduced. The defendants pleaded that the machine was received by them to be carried on a special contract containing, among others, the following conditions:—

1. "The company will not carry any boiler, cylinder, or machinery of any kind, unless by special agreement, and in any and every case where such are carried, it is at the owner's risk only and not otherwise."

2. "Nor will they (meaning the said defendant company) be responsible for the loss of or damage done to castings of any kind, cast iron work, stoves, stove furniture, nor for any hazardous or brittle article in package or otherwise, which shall have been delivered, either to be carried for hire or otherwise."

The cause was tried before McDONALD, C. J., at Yarmouth, June 26th, 1883.

The learned Judge directed the jury, if they found that the injury to the machine was the result of negligence on the part of the defendant company, or their servants, to assess reasonable damages for depreciation in value of the machine and for loss sustained by reason of the reduction of the capacity of the planer.

The jury found for plaintiff, damages \$200.

Bingay, Q. C., in support of appeal.—The Railway Act of 1880, sec. 25, sub. sec. 4, does not apply. The provisions refer to the sub-section immediately preceding. Damages during transportation are not included. Plaintiff has estopped himself by accepting the contract. He should have replied that the condition was void or inoperative. The contract he proves frees the defendants from liability. Chapter 43 of the Acts of 1873 incorporates with it and makes part of it certain sections of chapter 70 Revised Statutes. Whatever rights the companies have, under their charters, are preserved to them and cannot be taken away except by special legislation. My main point is that sub-section 4 of section 25 of the Acts of 1880 does not apply, but, if it does, the next section applies and limits the bringing of the action to six months. The Act does not need to be pleaded—all that is necessary is that it should be produced at the trial. The Act is referred to in the

pleadings which is enough. The contract to carry commenced from the time the goods reached the defendants hands; *Brown on Carriers*, sec. 184. (RIGBY, J.—I think it is premature to take that point.)

Pelton, Q. C., and Meagher, Q. C., in reply.—The evidence shows that there was not sufficient accommodation for loading goods on board the cars, and that this was chargeable to the negligence of the company. The jury have found this issue in our favor. Transportation refers not merely to the carrying on the cars, but the receiving of the goods at the place of delivery and placing them on board the cars. This brings the case within sub-section 2 of the Railway Act of 1890. (THOMPSON, J.—There seems to have been rather a want of skill than a want of accommodation.) The evidence shows neglect to provide means for placing goods on the cars which is a want of accommodation; *Roberts v. Great Western Railway Co.*, 13 U. C., Q. B., 615. Our cause of action is peculiarly within sub-section 3, which provides that goods are to be “taken, transported and discharged.” The following section gives redress to persons aggrieved “in the premises” that is in the “taking, transporting and discharging” which covers everything. The plea limiting the bringing of the action under section 26, sub-section 1, does not apply to injuries arising from the negligence of servants of the company, but to injuries arising from the construction or partly from one cause and partly from another; 13 U. C., Q. B., 615; 5 Q. B., 747; 4 M. & W., 749. The act under which defendants are incorporated is chapter 81 of the Acts of 1870. The court must take judicial notice of this Act. The defendants are not protected by the conditions against their own negligence. *Fitzgerald v. Grand Trunk Railway Co.*, 5 Supreme Court Canada Reports, 204; *L. R.*, 9 C. P., 325; *Robertson v. Dominion S. S. Co.*, 1 R. & G., 149. There is evidence that the defendants admitted their negligence. Some American cases on the question will be found in 16 *Curtis*, 722; 6 *Howard*, 344; 13 *Wend.*, 611.

Bingay, Q. C., in reply.—There is no evidence that there was not sufficient accommodation to load the goods. That would

be a question for expert evidence. The question was not put to the jury even on the evidence before the court. If there was want of accommodation there would have to be a special action for it. There is no evidence of neglect or refusal to receive or carry the machine. It was carried to the place of destination and there delivered to the plaintiff who received it. The object of putting in the words "owner's risk" is to protect the company, and to give cheap rates on goods that the company would not otherwise accept, where the owner is willing to take the risk. The words "any damage by reason of the railway" cover damage done in any way in the operation of the railway. The transportation commences the moment the contract is made. The defendants had the planer repaired and sent up to the defendant and informed him that if it did not work satisfactorily they would make any alterations that might be necessary. The defendant received it and said nothing until after action.

Pelton, Q. C., cites 23 *Wendell*, 306; *L. R.*, 9 *Q. B.*, 546.

THOMPSON, J., (April 22nd, 1884,) delivered judgment as follows:—

The defence to this action is expressed in the fourth plea:

"The said goods, to wit, machinery, were delivered by the plaintiff to the defendant company, and were received by it to be carried, as aforesaid, under a special contract between the plaintiff and the defendant company, signed by the plaintiff, his attorney, or agent, and subject to certain terms and conditions of carriage, contained in said contract, one of which conditions was 'that the company will not carry any boiler, cylinder, or machinery of any kind, unless by special agreement, and in any and every case where such are carried, it is at the owner's risk only and not otherwise.'"

There was such a contract between the parties in relation to the machine which was damaged—that contract was a contract for the carriage of the machine from Yarmouth to Hectanooga Station. The condition, above quoted, was one of the conditions of carriage, and would doubtless have availed to protect the defendants against the mishaps which might occur upon the transit, but this machine, at the time of the

accident, had not been carried by them on that journey or any other ;—it had not even been put on the train. The company's servants, in taking the machine from the plaintiff, through want of skill, or want of suitable appliances, dragged it across the car, from skids on which it was to be slid into position on the car, and let it fall on the other side of the car. The contract expressed in the receipt note, containing the condition above quoted never took effect. The conditions of carriage contained in the bill of lading or receipt note cannot be extended to what occurs before the lading, nor can they even protect the carrier, it seems from injury during the transit which results from the previous negligence of the carrier's servants ; *Tattersall v. Nat. St. Co.*, 12 Q. B. D., 297. When the plaintiff placed the planer on the platform, paid the freight, and made, tacitly, or otherwise, the agreement for carriage expressed in the receipt note, an implied contract arose, between him and the defendant company that the latter would, with reasonable care, take the machine and carry it under the terms and conditions of the receipt note. They did not take and carry it ; they broke it while setting about taking it, and their answer is : " If we had taken the planer and had had it laden, and it had been broken during carriage, our conditions of carriage would have compelled the plaintiff to submit to the loss." They cannot excuse themselves for breaking the plaintiff's property on the ground that if they had not broken it just then they would soon have been able to break it with impunity. The verdict establishes the negligence which constitutes the breach of the contract just referred to. All that has been said with regard to the condition quoted at the commencement of this judgment will apply equally to other similar conditions which the defendant company set up in their pleadings. I think it may be further said, with good reason, that the limited contract contained in the receipt note was made on the assumption that the company would provide proper means for putting the planer on their cars, and that, in this view, the decision in *G. T. R. Co. v. Fitzgerald*, 5 Sup. Ct. Can., 204, will apply. The rule for a new trial should therefore be discharged. As regards the demurrer, it only seems necessary to add that whether the

limitation expressed in sec. 26 of the N. S. Railway Act of 1880, of "suits for indemnity for any damage or injury sustained by reason of the railway," can, or cannot, be extended to actions for breach of contract in respect of injuries to goods contracted to be carried, the limitation has no effect on the present case, in which the breach was the neglect to provide proper appliances, or to use proper care, in the handling of property intended to be placed on the company's cars, but in fact pulled across them, and precipitated on the other side. The fact that an engine of the company was used in applying the force which did the mischief could make no difference.

Judgment should therefore be for the plaintiff on the demurrer.

RE CARVELL EX PARTE GLIDDON.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J. J.

(Decided April 22nd, 1885.)

English Bankruptcy Act.—County Court Judge acting in aid.—Appeal.

A COUNTY Court Judge was applied to to act in aid of, and as auxiliary to the London Bankruptcy Court, in relation to property of an English bankrupt situated in his district, and made an order accordingly.

Held, (McDONALD, C. J. dissenting), that no appeal would lie from such order, to the Supreme Court, either under the Insolvent Act of Canada which had given certain powers to the Judge in reference to insolvents, or under the County Court Acts, inasmuch as his order was not made by reason of any jurisdiction conferred by those acts, but by reason of the Imperial Bankruptcy Act which did not give such appeal.

This was an appeal from the following decision of the Judge of the County Court for District No. 1.

"A rule *nisi* was granted by me to set aside all proceedings on the part of the Maritime Bank of the Dominion of Canada against Patrick George Carvell and George McKeen, in a suit instituted in the Supreme Court at Halifax against the said debtors as absent or absconding, under which an attachment was issued and certain property of the defendants attached or released and discharged therefrom and handed over to Alfred Gliddon, the trustee appointed by the London Bankruptcy

Court, in which the estate of Francis Carvell & Sons was being settled by liquidation, by arrangement, on the ground that, at the time of the levy of the attachment, all the property of the defendant bankrupts had passed to and vested in the trustee, under the provisions of the Imperial Bankruptcy Act. The intervention of this court is sought under the 74th section of the Imperial Act which provides that every British court elsewhere, that is, outside of Great Britain and Ireland, having jurisdiction in bankruptcy or insolvency, and the officers thereof shall severally act in aid of and be auxiliary to each other in all matter of bankruptcy, and that an order and request of the court seeking aid should confer the same jurisdiction on the court to which the request is made as could be exercised by the court making the request.

Alfred Gliddon of London, on whose behalf this application is made, swears that he is the duly appointed trustee of the property and business of Patrick George Carvell and George McKeen doing business in London, England, as Francis Carvell & Sons, and that he was so appointed to the office of trustee on the 23rd April, 1883, and a sworn copy of the record of his appointment, as such trustee, is annexed to his affidavit, as also a verified copy of an order of the registrar requiring all persons having in their possession any effects of the debtors to deliver them to the trustee, Alfred Glidden, with all debts due the debtors.

On the 16th day of February an order was obtained from the London Bankruptcy Court, ordering that aid be sought from the Colonial Courts in Halifax, embodying a request that such courts, especially such courts as have bankruptcy or insolvency jurisdiction, should act in aid of and be auxiliary to the London court for the purpose, first, of recognizing Arthur Cooper as receiver and manager of the business of the debtors, and, secondly, to exercise the like jurisdiction which that court could exercise in regard to similar matters within its jurisdiction. On the 29th December, 1882, the debtors stopped payment, and, on the 13th January following, summoned a meeting of their creditors under section 125, subsection 1 of the Act. On the 11th January, 1883, the Maritime Bank of the Dominion of Canada instituted proceedings

against the defendants as absent or absconding debtors, and on the 13th and 26th of the same month, certain goods alleged to be the property of the debtors were attached. On the 29th December, 1882, when the defendants, by stopping payment, committed an act of bankruptcy, all their property, everywhere, became bound for the payment of their debts in bankruptcy, and vested in the registrar in the meantime for the benefit of the creditors, and to prevent its being improperly dealt with, until the court was in a position to appoint a receiver or manager, and the creditors may appoint a trustee, on whom devolves all the property of the bankrupt divisible among his creditors, all of which, on the appointment of Alfred Gliddon as trustee, vested in him, as of right and without any conveyance, and his title related back to the act of bankruptcy committed by the debtors as stated in their petition, or to any prior act of bankruptcy committed by them. The property of the debtors then vested in the trustee prior to the issue of the writ of attachment; but, if this had not been so, the attachment would not have availed to give priority to the attachers, because, by sub-sec. 39, section, 95 of the Act, such attachment would have been avoided unless the seizure and sale had been before the order of adjudication, to which it appears to me that the presentation of the petition in liquidation by arrangement is the equivalent, and the rule of law is that the personal estate out of England of a bankrupt in England will vest in his trustee, subject to any lien upon it acquired by the law of the country where the property is situate prior to the bankruptcy. It is somewhat doubtful whether the sheriff made what in the eye of the law would be held to be a levy, but what he did was not done till the 13th or 16th January, after the act of bankruptcy had been committed.

I have gone more at large into this last matter than perhaps was necessary out of deference to the contentions of Mr. Graham. If it is urged that there was no sufficient act of bankruptcy proved, or if the debt or its quality is called in question, or if the rights of Mr. Gliddon as receiver are assailed, the London Court is the tribunal before whom such contention should be had. The only duty of this court is to aid the London Court under the provisions of the Act, not to question,

investigate, or adjudicate upon matters already passed upon and purely within the province of that court. That the domicile of the bankrupts is not in Nova Scotia does not affect my powers. The property is situate here, and I am only called upon to do what the London Court could do if the property were within its jurisdiction. Nor is it any objection that my order may enure to restrain proceedings in another court. The London Court of Bankruptcy would not have been restrained by any such consideration if the process of a court situate within its jurisdiction had been evoked for the purpose of gaining for an individual creditor a priority contrary to law. Mr. Graham took objection to the jurisdiction of this court in the premises on the ground that it was not a British court. True, it is a Colonial court, but it is a court where Her Majesty is presumed to be present at all times, and, therefore, without too vaulting an ambition, I may humbly claim for this court the cognomen of a British court, and deem that it was referred to under the classification of a British court elsewhere. It is quite true that the Dominion Insolvency Act, to carry into effect which this court was invested with insolvency jurisdiction, has been repealed, but the court still lives, kept alive by legislative enactment, to adjudicate upon and wind up all unfinished business; it still, then, possesses insolvency jurisdiction, and therefore its aid may be solicited under section 74. It is hardly correct to say that the Dominion Act gives jurisdiction in insolvency only to the Judge and not to the court, and that, in consequence, the word court, in section 74, does not embrace within its purview this county court. The Dominion Act defines court to mean county court in Nova Scotia, and Judge to be a Judge of that court, and it can make no difference that in practice I generally sign orders myself, and not through the medium of the registrar; in either case it is the courts that acts.

The only other objection to which I shall refer is that the Imperial Act cannot apply to affect property situate in the Colonies, because the British North American Act gives the Dominion Parliament exclusive right to legislate in matters of bankruptcy and insolvency. Fortunately, in this case, there is no conflict between the Imperial and Dominion legislation,

and therefore I am not called upon to decide which in that case would prevail, and there is nothing to cast a doubt on the application of the provisions of the section referring to this Province, and nothing to render questionable the principle that an adjudication of bankruptcy in England vests the entire property of the bankrupt, wheresoever situate, in the officers of the London Court for equal distribution among the creditors. I think that the trustee has clearly shown himself entitled to the aid he seeks; that it is my duty to do what the London Court of Bankruptcy could and would do if its jurisdiction enabled it to reach property situate in this Province; and that the Maritime Bank has shown no reason that would justify my refusal. I shall therefore make the order applied for absolute. Although this motion was not *ex parte*, yet, as it partakes somewhat of the nature of an injunction, and the operation of the order will be to divest the Maritime Bank of property of which it assumes to have possessed itself by process of law, I think the trustee must give an unlimited undertaking to pay should the order hereafter prove to have been improperly granted, and that such undertaking be inserted in the order. *Ex parte Anderson*, L. R., 5 Ch. App., 481.

Henry, Q. C., in limine.—There is no appeal from the County Court Judge to this court under the circumstances. The aid of the County Court Judge was requested under the Imperial Bankruptcy Act of 1869, 32 and 33 Vict., chap. 71, section 74. The appeal under that section in England is to the chief Judge in bankruptcy.

Sedgewick, Q. C.—The order appealed from was made by the County Court Judge as such and this is the only court to which there is an appeal from the County Court. The Imperial Bankruptcy Act gave him no power. No specific request was made to the County Court Judge. (WEATHERBE, J.—He assumed to act under a request.) *L. R., 5 Chancery App., 473; L. R., 6 Ch. Div., 350.* In *ex parte Fletcher* aid was sought from the County Court of Durham and it was held that the order was made by the County Court Judge subject to appeal to the chief Judge.

Graham, Q. C.—The County Court Judge in this Province has a more extensive jurisdiction than the Judges of the auxilliary courts in England. In addition to the jurisdiction given under the English Act the Judge has all the jurisdiction that he would have in regard to similar matters within his own jurisdiction; *Imperial Act*, section 74. He must be acting under our own Act and in that case we have an appeal. If the Judge is acting without jurisdiction, he is acting as much under our Act as the English Act.

THOMPSON, J., (April 22nd, 1884,) delivered judgment as follows:—

I have come to the conclusion that no appeal to this court has been given, from such a decision as that which the appellant desires us to review, and, therefore, that none lies to us. The order of the County Court Judge was an intervention by him in aid of proceedings in the London (G. B.) Bankruptcy Court under the Imperial Bankruptcy Act of 1869, section 74. The Judge, so acting, released an attachment which the Maritime Bank of the Dominion of Canada had placed on property of debtors against whom bankruptcy proceedings are in progress in London. I think that whether he had power to do so or not the bank cannot test his authority by appeal. It was urged that the Insolvent Act of 1875 gave an appeal from the Insolvency Judge, and that Judge JOHNSTONE could only get his authority to intervene from having some remnant of insolvency jurisdiction under that Act, which, though repealed generally, remains in force for purposes connected with the completion of outstanding business, and therefore, perhaps, made the Judge one of the class who may "act in aid" under the Imperial statute. The Judge, however, in making the order appealed from, was not acting under the Canadian Statute, or doing any of the acts in respect of which that statute gave an appeal. It cannot be maintained that the appeal will lie because he was a County Court Judge for a like reason as that just stated. He made no decision or order such as the County Court Acts empowered him to make—he was not acting or professing to act under those Acts, and no appeal

was or could be given by the legislature that passed those Acts in respect of a proceeding in bankruptcy. The observations made in the judgment of this court in *McDonald v. McCuish* (*ante* p. 1) seem to apply to this question, but this case seems to be a plainer one against the appeal, because the Imperial Act, assuming it to confer jurisdiction on the Judge, conferred a special jurisdiction on him for the purpose of proceedings under the bankruptcy code of another country, outside of the course of the common law, or of any law in force in this Province. In this view the following authorities seem to apply; *22 Jur.*, 573; *Maxwell on Stat.*, 1st ed., p. 109, and *Hartley v. Hooker*, Cowp., 524. While I feel it safer to put my opinion on the broad ground that such an appeal has not been given by the Insolvency Act of Canada, or by the County Court Acts (notwithstanding the comprehensive words of those Acts), I am inclined to think that no such appeal could be given by any but the Imperial Parliament—that superior Parliament, which created the jurisdiction from which an appeal is sought, and that, as no appeal is given by the Imperial Act to this court in any case, we need not consider the language of the statutes of Canada and of Nova Scotia. In this view I am supported by the judgment of MOSS, C. J. A., in *Re Niagara Election*, 4 Ont. App., 408.

WEATHERBE and RIGBY, J J., concurred.

MCDONALD, C. J.—The authority under which the Judge for the County Court for District No. 1 claims to exercise jurisdiction in this matter, is that clause of the Imperial Bankrupt Act which provides “That the High Court, the County Courts, the Courts having jurisdiction in Bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of, and be auxiliary to each other in all matters of bankruptcy.” This statute, I apprehend, does not create any new court in this country, or confer any new jurisdiction upon any court now existing here. The reference in the statute is solely to “British courts elsewhere having jurisdiction in bankruptcy,” and that juris-

diction, whatever its extent may be as conferred by the laws of the country creating the court, is made auxilliary to the execution of the orders, decrees and judgments of the English Bankruptcy Courts. That assistance must, however, be rendered according to the rules of procedure and forms of practice, prescribed to the court by the laws of the country in which it is situated, and by which it is created, and the extent of its assistance cannot exceed the limits of the jurisdiction which it could, in this country, exercise in matters of bankruptcy and insolvency. By the County Court Act there is an appeal from the judgment, order, rule, or decision of the County Court Judge at Chambers, or in term, upon any question of law or fact to this court; and, by the Insolvent Act of 1875, 128, which confers jurisdiction in insolvency on the County Courts, an appeal is given to this court, "from any final order or judgment of the Insolvency Court." In my opinion that appeal lies to this court from any order made by the County Court, acting within its jurisdiction as a court of insolvency in this country, as well when exercising that jurisdiction as auxilliary to the English Court under the statute, as when exercising its functions under the Dominion Act of 1875. I do not deny the power of the Imperial Legislature to create a new court, or to confer new jurisdiction upon existing courts in the colonies of the Empire. It is a power which has not been exercised in this case, and is not, I apprehend, at all likely to be exercised in this Dominion. The clause of the English statute is worded, apparently, with great care to guard against any such interpretation or assumption of authority by the Imperial Parliament. The assistance of a court of recognized jurisdiction is invoked; no new jurisdiction is created; no new procedure is prescribed for the courts whose assistance is so invoked. The mode in which the assistance shall be sought by the English Courts is pointed out by the statute, but there is no attempt to dictate to the "British Courts elsewhere" how that assistance should be given. It is manifest, therefore, that the court appealed to for assistance would be powerless to render that assistance, except by means of the jurisdiction conferred and procedure prescribed for the exercise of its ordinary functions, and

from any order or decision made in the exercise of that jurisdiction there is an appeal to this court, and to this court only.

WALLACE v. CREELMAN.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J J.

(Decided April 22nd, 1884.)

Pleading.—Sufficiency of allegations.

IN an action brought for trespasses to plaintiff's mining areas, defendant justified as Commissioner of Mines under a forfeiture, and set out in one of his pleas, *inter alia*, that all proceedings requisite by law to be taken to effect a forfeiture of said lease were taken, and all necessary notices setting out defaults and breaches were duly given, and the defendant being such Commissioner duly gave judgment forfeiting said lease * * * in the form and manner prescribed by law.

Held, that this plea did not set out with sufficient particularity the steps taken to give the Commissioner jurisdiction to forfeit the lease.*

This was an action brought by plaintiff against the Commissioner of Public Works and Mines for the Province of Nova Scotia, to recover damages for entering upon certain gold mining areas of the plaintiff, and removing the plaintiff and his workmen therefrom. Defendant relied on pleas setting out a forfeiture of the lease under which plaintiff was in possession. Defendant's pleas were demurred to on a large number of grounds the most important of which, with the portions of the pleadings to which exception was taken, appear sufficiently in the judgments.

Wallace, in support of demurrer.—The plea that notice was duly given is not sufficient, being too general. It should show when, how, to whom, and under what circumstances the notice was given. There was nothing in the plea to show on whom the notice was served. The Commissioner had no authority until after notice given. He can only proceed against a party unlawfully in possession after a warrant issued and an adjudication had; *Revised Statutes*, chap. 9, sec. 76. The warrant should have been referred to in the plea, and set out so that the court could see it. A plea of

* The Court was evenly divided on the question of the sufficiency of the tenth plea, *q. v.*

payment to an action on a bond is intended to have been made after the day appointed for payment; *Chitty on Pleadings*, 571. The specific fact must be stated in the plea so that it may be admitted or denied. In trespass, where the defendant justifies under a writ, he must set it out specifically; *Chitty on Pleading*, 560—563; 8 C. B., 283; 3 A. & E., 433; 5 Q. B., 933.

Graham, Q. C., contra.—The statutable form of judgment is pleaded—nothing more can be required. (RIGBY, J.—All that shows is that the judgment was in the proper form, but that does not give jurisdiction.) It is sufficient to set out the form of judgment in the plea of justification. The seventh plea is that all necessary proceedings to give jurisdiction were duly taken. That would cover notice. The demurrer admits that all necessary proceedings were taken. *Bullen and Leake*, 770; 10 B. & C., 1002. In the *Queen v. Cameron*, 3 R. & C., 57, the sum of \$400 was stolen from a tax collector who was only allowed by law to have \$200 in his hands. It having been alleged that it was “duly” in his hands it was held that it must be taken that the whole \$400 were recovered from one person. See further as to meaning of the word “duly”, 11 M. & W., 875. It was not necessary to plead the warrant because where there is a forfeiture the Crown can enter irrespective of it. The lease was null and void for breach of conditions. It became so by its terms before judgment was delivered. The Crown could enter under the judgment declaring the lease void.

Wallace replied.

RIGBY, J., (April 22nd, 1884,) delivered judgment as follows:—

The plaintiff brought an action in this court against the defendant to recover damages for alleged trespasses to certain gold mining areas of the plaintiff; in which action defendant pleaded twelve pleas, to the 3rd, 7th, 8th, 9th and 10th of which plaintiff demurred. At the argument defendant's counsel admitted that he could not sustain the third plea and it remains for us to determine whether the other four are bad in law for the reasons assigned. The pleas in question are

intended to justify the alleged grievances by setting up a forfeiture of the lease of the areas, which constituted plaintiff's title, according to the provisions of sec. 67 and subsequent sections of chapter 9 of the Revised Statutes, the defendant being the Commissioner of Mines referred to in these sections; and that the acts complained of were performed by him after such forfeiture in causing plaintiff and his workmen to be removed from the areas. To justify defendant under the provisions of these sections it was necessary to allege a compliance with the requirements of them, and an essential preliminary to his jurisdiction under section 67, was that a notice, in the form of Schedule E, should be served upon the lessee, "or his agent or person principally employed on the premises," or should be posted upon the premises leased when no person could be found "upon whom to make service thereof," informing him of "the charge and appointing a time, (not less than thirty days after the service or posting of such notice) and place for the investigation of the same; and a duplicate of such notice should be posted up in the office of the commissioner, and another in that of the deputy for the district, if any, for at least thirty days next previous to the time so appointed." In *Chitty on Pleading*, at p. 256, (17th Am. Edit.) it is laid down that "a general statement of facts which admits of almost any proof to sustain it is objectionable," and that "the principle rule as to the mode of stating facts is that they must be set forth with certainty; by which term is signified a clear and distinct statement of the facts which constitute the cause of action or ground of defence, so that they may be understood by the party who is to answer them, by the jury who are to ascertain the truth of the allegations, and by the court who are to give judgment," and, at p. 566: "Every plea should be so pleaded as to be capable of trial, and, therefore, must consist of matter of fact the existence of which may be tried by a jury on an issue, or the sufficiency of which as a defence may be determined by the court upon demurrer, or of matter of record which is triable by the record itself. And if fact be improperly confounded or mixed in the plea with matter of law, so that it cannot be tried by the court or jury, the plea is bad; as if the defendant pleaded that

A lawfully enjoyed the goods of felons it would be bad; for the jury cannot determine whether he lawfully enjoyed nor the court whether he in fact enjoyed, and the plea should have stated the particular facts and title by which A did enjoy (9 Co., 25). So if the condition of a bond be that the defendant will show a sufficient discharge of an annuity, it seems that it cannot be pleaded merely that he showed a sufficient discharge; for the jury cannot try whether it is sufficient, and he ought to show what discharge he gave, in order that the court may judge whether it was sufficient." The seventh plea, after setting forth the lease, its conditions, and their breach, proceeds as follows: "And the defendant says that the said property, demised by the said lease and otherwise mentioned therein, is the property and premises referred to in the plaintiff's declaration, and that all the proceedings requisite by law to be taken to effect a forfeiture of the said lease, and of the premises conveyed thereby, were taken, and all necessary notices setting out the defaults and breaches herein alleged were duly given, and the defendant, as and being such commissioner, duly gave judgment, forfeiting the said lease, for the causes therein alleged, and revesting the said property and premises in the Crown in the form and manner prescribed by law after hearing the case," &c. It seems to me that these allegations relating to the forfeiture proceedings are not stated with any greater certainty than if the averment was simply that the lease had been duly forfeited according to law. It was urged before us that the words "necessary" and "duly" contained in that part of the plea above set forth, supplied all that was required to give the plea sufficient certainty, and cases were cited as authorities to this effect. I have, however, found no case in which such words were held efficacious when the allegations were so general as in this plea. In *Painter v. The Queen*, 10 Q. B., at p. 921, PARKE B. held that where a statute required that a poor rate should be allowed at the Metropolitan Police Court, an allegation in a declaration "that it had been duly allowed" was sufficient. In *Butcher v. Stewart*, 11 M. & W., 857, the allegation in the declaration after setting out a *ca. sa.* was that the sheriff duly arrested the defendant named in it,

and it was held that the meaning of that allegation was that the sheriff had duly acted under the writ so as not to become a trespasser. In *Crossley v. Robinson*, 10 A. & E., 132, Lord DENMAN and PATTERSON, J. held where it was necessary to allege service of an order on overseers, that, at least after verdict, an allegation in an indictment that an order was duly sent to the overseers was sufficient without alleging actual service on them. In *Cousins v. Buller*, 6 U. C., P. R., 71, it was held by the master that an allegation in a declaration that a chose in action was "duly assigned in the manner required by the Act" was sufficient, and that it was not necessary to allege whether the assignment was direct or through intermediate parties—and this decision was upheld by GALT, J. In *Smith v. The Mutual Insurance Co.*, 27 U. C., C. P., 448, it was held, overruling C. J. HARRISON, that an allegation in a plea to an action on a Mutual insurance policy that a certain assessment was declared by defendant on plaintiff's premium note, of which assessment the plaintiff had "due notice," but did not pay the same, whereby the policy became void, was sufficient without alleging the manner in which the notice was given. In *Nicholson v. Gunn*, 35 U. C., Q. B., 13, WILSON, J., in delivering the judgment of the court, held that under an allegation in the replication that an assignee of an insolvent, under the Insolvent Act of 1869, had "duly reconveyed to the plaintiff," and issue joined on it, the plaintiff would be bound to prove, in the absence of a confirmation by the Judge, that the assignee had, immediately on the deposit of the composition and discharge with him, given notice by advertisement of the same according to the 97th section, for, if there were no such notice, the assignee did "not duly reconvey to the plaintiff as alleged." This last case certainly goes very far, and I doubt whether, if the same case came before me, even my very great respect for the opinions of the learned Judges composing that court would induce me to follow it. But it will be observed that in all these cases the word "duly" had reference to some specific act done by or to some particular person or authority, and would be more like the case before us if this plea had alleged that a notice had been duly served on a person named, or that plaintiff or the

lessee had due notice, or that notice had been duly served in a specified way. In *Chitty on Pleadings*, already cited from, at p. 260, it is laid down that the words "duly," "lawfully," "sufficient," &c., without showing the matter of fact with convenient certainty, are seldom of avail in pleading. In *The Queen v. Keightly*, 8 Q. B., 882, WILLIAMS, J. said that the word "duly" would not supply a defective allegation in pleading. POWYS, J., in *Wallis v. Scott*, 1 Stra., 89, says: "Where notice or a request are by law necessary, there the general averment will not be sufficient; but it must be particularly set forth that the court may judge whether the notice or request were sufficient." *Everard v. Patterson*, 6 Taunt., 645, was an action upon an award which the submission required should be made in writing under the hands of the arbitrators. The declaration alleged that the arbitrators in due manner duly made their award in writing, and the Court of Exchequer Chamber, upon a writ of error, overruled the judgment of the King's Bench, and held that the averment that the arbitrators had "duly made their award in writing" did not necessarily import that it was under their hands. See also the cases of *Williams v. Germaine*, 7 B. & C., 468, and *Brazier v. Jones*, 8 B. & C., 124, where the word "duly" was not held sufficient in cases where the allegations were less general than in the plea under consideration, I think it was not enough to say that "all the proceedings requisite by law to be taken to effect a forfeiture were taken," but the facts should have been stated which constituted such requisites. I am also of opinion that the allegation as to notice is too general; the plea should at least have stated upon whom, or in what manner the notices were served. And, further, while the allegation is that the notices set out the defaults and breaches, the plea omits the necessary averment that they contained any appointment of the time and place for the investigation of the charge. For these reasons I have concluded that the seventh plea is bad, and it follows that the eighth plea, which repeats the allegations referred to, with nothing additional to supply the defects, must also go. The allegations as to notice in the ninth and tenth pleas are more specific than in the seventh, but yet, it seems to me, not sufficiently so. They set

out that "a notice, in the form prescribed by chapter 9 of the Revised Statutes, 4th series, 'Of Mines and Minerals,' was duly served as required by the said chapter, and the Acts in amendment thereof, and was duly given as required by said chapter containing all the matters required by law to give validity to the judgment" thereafter mentioned. These pleas, I think, should have been more certain in relation to the service of the notice, and are also bad in alleging that the notice contained the matters required by law, instead of alleging what they did contain.

The demurrers should be sustained with costs.

WEATHERBE, J.—There is nothing complicated or difficult in the clauses of the public statute of this province relating to mines, chapter 9 Revised Statutes, and the amending Acts, touching the case before us. If a lease of gold mines, issued by the commissioner, has become forfeitable, notice prescribed by the statute is required to be given, and a hearing takes place before the commissioner. At the hearing before the commissioner, upon proof of such notice, and upon hearing the evidence relating to the case, which shall be taken in writing and signed by the witnesses, the commissioner, on being satisfied of the non-fulfillment of the requirements of the chapter, shall give judgment forfeiting the lease, and revesting the premises in the crown—the statute prescribing the form of the judgment. It is also enacted that the commissioner shall have power, by warrant under his hand and seal, addressed to the sheriff of the county, to cause any person unlawfully in possession of a mine, so adjudged to be forfeited, to be removed from the possession and occupation thereof. It is admitted that the pleas properly set forth the conditions of the lease by which it became utterly null and void, but the difficulty arises on the demurrer to the 7th, 8th, 9th and 10th pleas in determining whether there is a proper allegation:—

1. Of the judgment of forfeiture.
2. Of the warrant for the removal.

A great deal was said about the imperfect allegation of notice summoning the plaintiff in this action to the hearing which, it seems to me, is beside the question; because, I think,

it was incumbent on the commissioner—and that was a ground argued for defendant—upon the proper proof of notice according to the Act, and the proof of breach of conditions—and he was bound—to pronounce the judgment, and could justify under such judgment, and the warrant which necessarily followed upon that judgment. The question here is this:—Do the impeached pleas, or any of them, properly allege the judgment or the warrant?

The 10th plea repeats the 7th and 9th, and then professes to set out the warrant.

The 9th plea, which repeats the 7th, and is made a part of the 10th; sets out that before the alleged grievances a notice in the form prescribed by chapter 9 of the Revised Statutes, 4th series, "Of Mines and Minerals," was duly served, as required by said chapter and the Acts in amendment thereof, and was duly given as required by the said chapter, and then it proceeds to allege that, at the time and place appointed, the commissioner proceeded to investigate the case, "and the service and posting of the notice being duly proved as required by law, on hearing the evidence duly taken and signed, the commissioner, being satisfied of the non-fulfillment of the conditions of the lease and of the said chapter, duly gave and signed judgment forfeiting the lease and revesting the premises in the Crown."

And then the 10th plea sets forth that, at the time of the alleged grievances, the plaintiff and his workmen mentioned in the declaration were unlawfully in possession of the mine so adjudged to be forfeited, whereupon the defendant, as such Commissioner of Mines, by warrant under his hand and seal, addressed to the sheriff of the county of Halifax, (being the county wherein the gold district in which said leased premises were) caused the persons unlawfully in possession of the mine, so adjudged to be forfeited, to be removed from the possession and occupation thereof, the doing of which is what is complained of, and the defendant says that, excepting as is herein stated, he did not commit the acts complained of." Most of the argument was as to the effect of the word "duly," but putting out of sight that word and the authorities cited, and others on the same point, here we have the words of the

statute incorporated and pleaded, and the statute referred to and cited in the impeached pleading alleging that the notice was proved before the commissioner and he gave and signed judgment forfeiting the lease and revesting the premises in the Crown, the only two things required to be adjudicated. And the warrant, as set out in the 10th plea, contains everything which it was contended by plaintiff at the argument it should have, and I do not see how it could have been otherwise or better pleaded than it is. So that, I think, the 10th plea contains all the allegations required for a complete defence to the action and ought to stand. Moreover, upon examining the demurrer to the 10th plea, I observe that no matter of law intended to be argued is stated upon which the plaintiff can raise any objection, either as to the invalidity of the notice summoning him, the judgment of forfeiture itself, or the insufficiency of the warrant provided for by the 76th section of the Act. This is the whole of the demurrer to the 10th plea:—

“And the plaintiff says that the defendant’s 10th plea is bad in substance for the reasons taken to the 9th plea, and the plaintiff repeats the said reasons, and each of them to the defendant’s 10th plea. And for a further ground to said 10th plea, the plaintiff says that defendant does not show that before the issuing of the warrant there was any adjudication by any competent court of an unlawful possession by the plaintiff, or that the plaintiff was summoned, or appeared, or was represented at any trial or investigation respecting an unlawful possession, or that the said warrant provided for any investigation to be had of such a charge or complaint. And for a further ground to the 10th plea, because it is alleged in said 10th plea that one Henry O’Toole held a lease of said premises at the time of the commission of the wrongs and injuries complained of, and if so, the defendant had no right, as Commissioner of Mines or otherwise, to interfere with the plaintiff’s possession, however wrongful, except by authority of O’Toole, which the defendant has not alleged in said plea.”

The grounds stated here and argued were that there should have been, after the judgment of forfeiture, another adjudication of illegal possession, and that the warrant should

have provided for such adjudication to which plaintiff should have been brought for trial on a charge that he was holding unlawfully after judgement of forfeiture, and that the lease mentioned in the 10th plea precluded the commissioner from acting under section 76, nothing of which requires comment. It is true that in this demurrer the plaintiff alleges that he repeats the six reasons and each of them taken to the ninth plea. It is not necessary to say whether it is justifiable to plead several pleas without repeating them to the same count or to a declaration upon the proper suggestions as that question is not raised. But even if it were raised by bad pleading in the demurrer that would not avail. Can we take notice at all of matters of law not stated in a demurrer as reasons for objecting to a plea? The statute says that in every demurrer some matter of law intended to be argued shall be stated, and all words of a general character in a demurrer attacking a pleading shall be wholly unavailable. The party demurring is required to lay his finger on the very point objected to. In the other pleas objected to there is no authority by warrant for the removal of the party unlawfully in possession alleged, and it is not alleged in the 7th and 9th pleas in what manner, it seems to me, the plaintiffs were removed, from which we can see that plaintiff was justified in the acts complained of. It was argued that the forfeiture being complete, and the lease from the Crown being declared null and void, the Commissioner had a right, without the statutable warrants or other process, acting on behalf of Her Majesty the Queen, to forcibly remove the plaintiff and others unlawfully in possession; but no authority was adduced to support this contention. The 10th plea, I think, covers the whole defence which defendant can make available, and if other pleas are to be relied on I think they can only be obtained by amendment. We had very little authority from plaintiff's counsel who relied on citing elementary law from *Chitty on Pleadings* to show, for instance, that a plea must be certain, where almost at the same page, the author points out a very important exception to which a note is added, and no less than a dozen authorities cited by the American editor to show that this

exception applies in setting forth the judgments of an inferior court, where it is only necessary to set forth so much as was sufficient to give the court or magistrate jurisdiction, and then to state that *tuliter processum est* such proceedings were thereupon had that a certain judgment was rendered. * * *

One of the passages from Chitty cited to us refers to Lord COKE's famous commentary as to "certainty in pleading," and the same page cites the words of a learned Judge that the language of COKE on the subject is "a mere jargon of words." Many of the reasons for the "certainty" relied on have passed away with the circumstances of the time. And it must be confessed there is no very safe principle to guide us. To say that a plea is "not certain enough" or "too general" means nothing. If no principle can be stated we must go to decided cases if they are to be found. In *Nightingale v. Wilcorson*, 10 B. & C., 202, it was held that, in a declaration against the sheriff for an escape, it was sufficient to allege that the writ directing the arrest was duly endorsed for bail, without showing that this was by virtue of an affidavit made and filed of record. The cases cited to us from 10 Q. B., 921; 10 Ad. & Ell., 132; 11 M. & W., 857; 35 U. C., Q. B., 13; 27 U. C., C. P., 448; 6 U. C., P. R., 71, are all in point and favor the defendant's contention so far as that applies. The decision of the U. C. Court of Queen's Bench in the case cited is precisely in point as the question was one of pleading the statute, and I should be reluctant to refuse to give weight to this decision without adding some reason for ignoring good law. In *Hamilton v. Lyman*, 9 Mass., 17, in an action for assault and battery, on demurrer to the plea on the ground of uncertainty, PARKER, J., in delivering the judgment of the court, said: "It would have been sufficient for the defendant generally to have set forth that he had recovered judgment, that execution had issued thereon, and that, by force of such execution, he had caused the arrest complained of, leaving the plaintiff, in his replication, to show any defects if any existed." The Massachusetts decisions are valuable on this question because there were able judges and they adopted the English law. In *Sewall v. Valentine*, 6 Pick., 278, there was a demurrer to a plea for uncertainty as here, and the same passage in *Chitty on*

Pleading, and the English authorities there cited were relied on by plaintiff's counsel. A notice and bond required by statute were pleaded, and PARKER, C. J., in giving judgment, said, as to the objection that the plea did not aver at what places the notices were posted, that the defendant might have denied that the notices were publicly posted, and then, on issue, the fact whether the places were public or not would have appeared in evidence. He said:—It has not been the practice to plead a defence of this kind so minutely; but it has been thought sufficient to aver that the defendant was duly appointed administrator and gave bonds and notice according to law. This plea contains all and a great deal more than is usual." He said the defendant, if the bond was not pursuant to law, might avail himself of the defect by denying that such bond as the law required was given. In *McGee v. Barber*, 31 Pick., 213, the plea was that a writ was endorsed before service as the statute required; *Chitty on Pleading*, *Wms. Sanders*, *Stephens on Pleading*, besides other English authorities were relied on, but SHAW, C. J., in giving the judgment of the court said: "We think it was not necessary to aver that the writ was endorsed before service. The purpose of the endorsement is declared by the statute. The writ could not be legally served without an endorsement, and, therefore, the averment that it was endorsed is to be considered as used technically, and to import, by legal intendment, that it was indorsed conformably to the statute before service." In *Burdett v. Grew*, 8 Pick., 109, it was alleged that the parties were "duly appointed executors" of deceased, and "then and there duly qualified themselves as such executors by giving bonds according to law." The statute also required that notice should be posted in the place where the deceased last dwelt, which was omitted, and though it was stated that there was publication in the *Gazette*, there was no statement that the court directed such publication, which alone could justify that form of publication. There was a demurrer, which was argued on English authorities, and the court held, though it was stated they did not recommend that form of pleading, that it was not fatally defective. With respect to the notice

the court said: "The plaintiff might have replied and traversed the proof of notice with all its attending circumstances. The only possible use of designating the particular places of posting is to give notice to the other party that he may be the better prepared to contest the proof to be offered in support of the plea. But the court have power to guard against the effects of surprise and will exercise it on every proper occasion." As to the bond it was said: "Nor do we think that the objection that there is no direct averment, that the bond was given to the Judge of Probate of any avail. To aver, as is done in the plea, that the executors gave bonds according to law, is, we apprehend, sufficient." In *Hale v. Dennis*, 4 Pick., 504, the declaration alleged that the writ was delivered to defendant for service and was duly served and returned, that goods of great value were attached thereon to respond the judgment which might be recovered without suit—that the action was duly entered and judgment recovered, and that, within thirty days next after the judgment, execution was sued out and delivered to defendant to be by him duly served and levied, and that defendant would not and did not levy, &c. It was contended that the facts were not alleged with sufficient certainty, but the declaration was held good. *Leland v. Kingsbury*, 24 Pick., 315, was a demurrer, and the question was whether a replication to a plea of good performance of an administration bond sufficiently set forth the proceedings in the Court of Probate, which is pertinent to the case before us. MARTIN, J., who delivered the opinion of the court, said: "The argument, if sound, requires that the replication should set forth not only the decree, but the prior decree allowing the accounts. But why stop here? Why not go back to the beginning? For if the preliminary proceedings were invalid there could be no legal examination or allowance of the account. But we think it was unnecessary to go behind the order to pay the balance into the treasury. This contains all the recital of the previous proceedings necessary to render it valid. The Judge of Probate having a general jurisdiction of the subject must be presumed, in all the preliminary proceedings, to have discharged his duty." There was a demurer in *Moore v. Parker*, 3 Mass., 310, which

shows that to justify in trespass for taking and carrying away the plaintiff's goods under a writ of replevin it is sufficient, in pleading the bond, to allege "that a bond was given pursuant to the statute."

The plaintiff has succeeded in part and the defendant in part. And there should be no costs, I think, of this argument to either party.

SMITH, J.—At first I had doubt as to the sufficiency of the whole of the pleas, but, after looking into the modern authorities, some of which have been cited by my brother WEATHERBE, I have come to the conclusion that the justification relied upon by the defendant is clearly and properly set out in the tenth plea as the law requires.

MCDONALD, C. J.—I concur fully in the judgment of my brother RIGBY.

GATES v. DAVIDSON ET AL.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J J.

(Decided April 22nd, 1884.)

Trespass and Trover.—Measurements and distances.—Weight of evidence.—Verdict set aside.

PLAINTIFF had to prove title. His place of beginning was identified, and his description in the grant then read: "running south 52 chains to a large pine tree marked "J. G.", and thence west," &c. To reach the locus the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description or at the end of the surveyor's line. At the latter point, however, a spruce tree was marked "H. G." and "J. G." The plan attached to the grant represented the lot as a different shape from that claimed, and the area expressed in the grant was inconsistent with plaintiff's contention.

Held, by McDONALD, C. J., and WEATHERBE and THOMPSON, J J., that the plaintiff had given no evidence of title to the locus, and by RIGBY, J., that the preponderance of evidence was against plaintiff's contention.

Verdict for plaintiff therefore set aside.

This was an action for trespass to land, with counts in trover for the conversion of logs, tried before RIGBY, J., at Kentville, August 21st, 1883. Plaintiff's claim to the land in question was based upon conveyances originating in a grant from the Crown to James and Henry Cates, dated December, 30th, 1854. The learned Judge instructed the jury that it

was necessary for the plaintiff to establish possession in himself, at the time of the alleged trespass to the land on which the logs had been cut, to enable him to recover in this action; that no actual possession by him had been proved, but, if his title had been derived from a Crown grant covering the locus, the law vested in him a sufficient possession of that area. The defendant's counsel had raised a contention as to the effect of some of the conveyances included in plaintiff's title, but the learned Judge held them to be sufficient to vest in the plaintiff whatever title had passed to J. and H. Gates under the grant to them from the Crown. He said it was manifest from the evidence that if the distances and area specified in the grant were to prevail, the plaintiff could not succeed, as the southern boundary of that grant would not, in that case, reach as far south as the so-called Brennan line, and consequently would not cover any part of the area in which the alleged trespass had been committed. It was, however, a settled principle of law that where known monuments and land marks, as well as a fixed area and stated distances were used in describing land granted under such a document, the natural boundaries, if inconsistent with the given area and distances, were to prevail. That, in looking for the natural boundaries of the grant in question, they would not be embarrassed by the necessity of any enquiry as to the position of the point mentioned in that grant, or as to its northern boundary or the locality of the Collin's grant, defendant's counsel having admitted, in his address to them, that there was no controversy on these points; but that the main question for them to consider was whether they were satisfied by the evidence as to the position of the south-east and south-west corner landmarks mentioned in the grant, and thus of its southern boundary upon the ground, and, if so, whether such boundary lay far enough to the south to cover the site of the alleged trespass, or any part of it. If these corners and boundaries had not been satisfactorily established, or had been shown to be the north of the alleged trespass they would have to fall back upon the distances and area stated in the grant, in which event their verdict should be for defendants. Starting at the recognized north-east corner,

they were to consider the evidence which they had heard in relation to a line running thence south, to the corner claimed by plaintiff as the south-east corner of his grant. That he did not think that, merely because they could not find, at the latter corner, a pine tree with the letters "J. G." on it, they were bound to conclude that the corner claimed by plaintiff was not the corner described in the grant, if they felt satisfied it was the corner actually intended by the description, and either through inadvertance had not been correctly marked, or the mark had since been obliterated, or the original tree removed. That a line had been traced upon the ground from that south-east corner to the corner claimed by plaintiff as his south-west corner, a tree similar to the one, and with the letters specified in the grant; it also had the additional letters "H. G.," and other marks, and these latter facts were material for their consideration in considering whether this was the corner tree referred to in the grant, though they were not bound to conclude that, in consequence of its containing such additional letters and marks, it was not the corner intended in the description. That, if they were satisfied that these two southern corners were the corners mentioned in the grant, the line running between them would be the southern boundary, and they would have then to determine what trees were cut upon the lands within these boundaries south of the Brennan line described in the amended declaration by Russell and his men in the winter of 1879-80, and the value of them standing, which, as it was evident the land was only valuable for the timber, would be the damage which plaintiff would be entitled to; and for such damage, if done upon plaintiff's land, the evidence had clearly established the defendants were jointly liable. In considering the evidence relating to the land marks mentioned in plaintiff's grant, he informed them that they were not to conclude that the survey which Creamer had testified to as having been made by Armstrong was that from which the plan of survey referred to in that grant was made. That from Creamer's evidence it appeared that the survey was made anterior to the grant, and it did not at all follow that it was the survey for that grant and upon which it was afterwards issued;

though the evidence was important, if they believed it, in establishing the origin of the corners and lines which were found upon the ground. That a good deal of evidence had been given as to the position of the Dawson grant under which defendants claimed; and, if it was material to the question before them, he presumed they would have little difficulty in deciding that the so-called Brennan line was the northern boundary of that grant. That the defendants were entitled to the benefit of any argument that might be raised from the fact that it appeared on the face of the two grants that they were both made from plans prepared by the same surveyor—Armstrong, and the improbability that he would lay off on the Crown grant the same land to two different persons. Otherwise it was immaterial for their consideration whether the locus was or was not covered by defendants' documentary title. The Gates' grant was the oldest and must prevail as against a subsequent grant covering the same lands, and the burthen was upon plaintiff to establish to their satisfaction that the side lines of his grant ran far enough south to cover the lands where the logs had been cut, and, if he had failed in this, defendants should have their verdict.

The jury found a verdict for plaintiff, assessing the damages at \$1,000, and the cause now came before the court on a rule to set the verdict aside, and for a new trial, obtained on the usual grounds.

Harrington, Q. C., and *Roscoe*, in support of rule.—Our main contention is that there is no monument at the first corner, and that, by going a mile past it, a tree is found bearing a different mark from that in the plan; *Davidson v. Rainsford*, 17 Mass., 207. The defendant was in possession of the locus under a paper title covering it, and was using it for the only purpose for which it could be used. Plaintiff must show an entry to maintain his action; *Turner v. Cameron Co.*, 5 Exch., 944; *Harrison v. Blackburn*, 17 C. B., N. S., 690. The defect in the description was a patent ambiguity which could not be explained, and the deed, to that extent, was void for uncertainty; *Dart on Vendors*, 219; *Wells on Law and*

Fact, 142. The plan made by Armstrong, after his original survey, was improperly rejected.

Henry, Q. C. and Borden, contra.—There is evidence of the lines and corners in dispute. The spruce tree bears the marks called for, although it bears others. There was no evidence about the rejected plan. There is strong evidence to fix the south-west corner, and the jury have found it. The defendant's surveyor corroborates our witnesses. Neilly ran over the lines and found the lines and corners and monuments as described. The case of *LeCain v. Hosterman*, 2 N. S. Decisions, 413, entirely covers the ground in regard to patent and latent ambiguity. The difficulty was greater there than here. The matter is also discussed in *Washburn on Real Property*, vol. 3, p. 424. The plaintiff's grant was one with recognizable corners, and the distances must give way to them. It is for the jury to find the corners.

Roscoe, in reply.—As to the rejection of Armstrong's plan of survey, cites *Greenleaf on Evidence*, vol. 1, sec. 483. The plan was a document of a public nature made by a public officer in the discharge of his duty, found in the office where it would be placed in ordinary course. Where a party has entered into possession as the defendant did here trespass will not lie; *Waterman on Trespass*, 371. The defendant's acts were such a disseisin of the plaintiff as to make it necessary for him to bring ejectment. The plan being attached to the grant is part of it and may govern monuments; *Davison v. Rainsford*, 17 Mass., 207.

THOMPSON, J., (April 22nd, 1884,) delivered judgment as follows:—

The plaintiff, not having been in possession of the locus at the time of the alleged trespass, relies on title. The origin of that title was a grant from the Crown, dated 30th Dec., 1854, to James and Henry Gates. The place of beginning was a spruce tree marked "B. W.," and there does not seem to have been any difficulty up to the time of the trial in identifying the starting point on the ground. The length of the line from that starting point running south is really the point which the plaintiff has to establish. The grant says "running south

fifty-two chains to a large pine tree marked "J. G.," and thence west," &c., but such a distance will not reach the locus, and plaintiff claims the right to extend his line about fifty chains further, before turning westward, and must do so in order to cover the area on which defendant committed the trespass. His claim is based on the fact that no pine tree so marked is to be found at the distance of fifty-two chains; that the marks which indicate, on the land, the course of the line "running south" are continued, in the same direction, past the fifty-two chain point, and for about fifty chains beyond, when they turn westward, the turn being marked as the surveyors mark a corner, and there being, at or about that place, a spruce tree marked "H. G." and "J. G.," with a pine tree, near by, but not marked, or marked unintelligibly and at a recent date. All this seems to me nothing more than that there is no large pine tree marked "J. G." at the fifty-two chain point. In the circumstance that the line-marks continue farther south than fifty-two chains I can see no evidence of any intention on the part of the Crown to extend the Gates title farther on. The line may have been continued on as the base line for other grants, or as a proposed line which the Crown did not adopt in making the grant, or for any one of many reasons other than for the reason that the Gates's should have the land to the south. Much less did that continuation serve to confer any title on the Gates's. After that line was made, assuming it, as plaintiff desires us to believe, to have been made at what is called the "original survey,"—(that is the survey from which the grant was prepared),—the grant was made, giving to the Gates's a shorter line;—they accepted that grant and their successors in the title have no pretence for saying that the description and the grant is to be controlled by the line which the surveyor had run. The circumstance of the letters "J. G." being found, with other letters, on a tree, different from the tree described in the grant, and in a totally different place,—a place about twice as far from the beginning point as the place at which the grant described it as being, seems to me to be no evidence whatever that that tree was the tree referred to in the grant,—far less was it such evidence as would warrant us in saying,

“there is a monument which should control the distance given in the grant.” (See *118 Mass.*, 581). The absence of the monument from the place where the grant would lead us to look for it may authorize us to look for it within a reasonable distance from that point, but the plaintiff is not content with a reasonable distance,—he goes looking for the monument a distance unreasonably far, in view of the distance expressed in the grant, and in view of the dimensions of the land which the Crown declared an intention to convey,—and, after all, does not find it. The distance given in the grant is only to be controlled by the monument, and, in this instance, the monument does not exist—appears never to have been made. The grant is strong against the plaintiff’s theory in three respects; it declares that the lot “is particularly marked and described in the annexed plan,” and that plan again specifies the length of the line in question as fifty-two chains; then the plan shews the lot to be one of an entirely different shape from that which must be delineated to suit the plaintiff’s description, and, finally, the contents of the grant are stated both in the grant and plan, as being 228 acres, while the lines claimed by the plaintiff would embrace double the quantity.

I think the plaintiff has entirely failed to shew any title to the locus, and that, as he had no possession to rely on, his verdict must be set aside.

RIGBY, J.—I cannot agree that there was *no* evidence for the jury that the line claimed by the plaintiff is the southern line of his grant. It is true that the south-east corner, as found, is not in accordance with the described monument, but the south-west corner is a spruce marked in correspondence with the grant, while, where the corners should be (if we are to be controlled by the distances mentioned in the grant) no corners are to be found.

It seems to me, however, that the great preponderance of evidence is opposed to plaintiff’s contention, and I am satisfied that the verdict, on that ground, should be set aside.

McDONALD ET AL. v. McMASTER ET AL.

Before McDONALD, C. J., and SMITH, WEATHERBE, and RIGBY, J. J.

(Decided April 22nd, 1884.)

Estoppel.—Evidence.—Registry of Deed.

THE plaintiff in an action of ejectment relied upon a deed of the land in dispute from H. M. to R. M. The only evidence of the execution of the deed was that of D. M., the witness, who testified to the fact of its registry. R. M. was ignorant of the existence of the deed for several years afterwards. At the time the deed was recorded a judgment was about to be registered against H. M.

Held, per RIGBY and WEATHERBE, J. J., that the defendants were estopped from denying the due execution of the deed from H. M. to R. M.*

Per McDONALD, C. J., and SMITH, J., that there was no evidence of the execution of the deed.

Ejectment to recover possession of a lot of land situate at Judique, in the County of Inverness. The action was commenced by the Honorable Peter Smyth, and was continued by the present plaintiffs as his executors.

The cause was originally tried before McDONALD, J., Oct. 27th, 1880, when a verdict was found for plaintiff. This verdict having been set aside, and a new trial granted, the cause was re-tried June 19th, 1883, before WEATHERBE, J., when further evidence was produced, and the learned Judge being of opinion that the case now stood in a different position, it was agreed that the plaintiff should become non-suited, with leave to move to set the same aside.

The facts appear sufficiently in the judgments below and in the case as previously reported,—*3 R. & G.*, 372.

The motion to set the non-suit aside was argued by *McDonnell, Q. C.* and *Meagher, Q. C.* in support of rule, and by *Graham, Q. C.*, contra.

RIGBY, J., (April 22nd, 1884,) delivered judgment as follows:

This action was brought by the late Hon. Peter Smyth to eject defendants from a lot of land formerly belonging to Hugh McMaster, now deceased, whose son Hugh, the younger, one of the defendants, appeared and pleaded a tenancy in in common with plaintiffs of the land in question. Mr. Smyth having died, his executors became plaintiffs by the

* See *R. & G.*, 372.

usual suggestion. Plaintiff's title is claimed from old Hugh McMaster through two distinct channels.

1st. It is alleged that the latter, by deed dated June 18th, 1856, conveyed the locus to his son Ronald, who, on the 19th April, 1869, mortgaged it to Smyth the original plaintiff; that this mortgage having been foreclosed, the land was purchased by the mortgagee at the sheriff's sale, who received the usual sheriff's deed, dated Oct. 3rd, 1874.

2nd. John McMaster, another son of the deceased Hugh, is the channel of the other title set up by plaintiffs. It is alleged that one John Graham having recovered judgment against old Hugh on the 20th of June, 1856, caused the locus to be sold under execution; that it was purchased at the sheriff's sale by John, who received the usual sheriff's deed, and who, on the 13th of April, 1869, mortgaged it to the original plaintiff; that this mortgage was foreclosed and the lands purchased at the sheriff's sale by the mortgagee, who obtained the usual sheriff's deed, also dated Oct. 3rd, 1874.

The only questions arising under the title through Ronald McMaster, are:—Was there any sufficient evidence of the execution of the deed from old Hugh McMaster to Ronald; and, if not, can the defendant Hugh, claiming through his father, set this up as a defense under the facts in proof? This was the second trial of this cause. At the former one plaintiffs obtained a verdict, which we set aside, because we considered the evidence of the delivery of the deed to Ronald was insufficient. At the present trial the evidence on this point has not been strengthened, but it is contended that the defendant is estopped from setting up non-delivery of the deed as a defense. This was not urged at the last argument, but additional evidence was given at the last trial, material to this view of the case. The principles regulating the doctrine of estoppel have been so frequently discussed in this court during the last few years, that it is hardly necessary now to go into any detailed exposition of the law. See *McKay v. Bonnett*, 3 Russell & Chesley, 139; *McKay v. Bonnett*, 2 Russell & Geldert, 96; *Fitzrandolph v. Shanley*, 2 Russell & Geldert, 199. It goes without saying that if old Hugh McMaster would be estopped from denying the due execution of the

deed to Ronald, that his son Hugh, the defendant, privy to him in title, would be equally estopped.

Now I think there is evidence in the case before us that old Hugh had caused to be registered in the Registry of Deeds at Port Hood, what purported to be a conveyance in fee of the land in question, to Ronald. Donald McMaster, another of Hugh's sons, in his evidence, says : " I went to the Registry of Deeds office and proved the deed from my father Hugh McMaster to Ronald McMaster, his son ; it was registered 17th June, 1856 ; I took the deed to the registry office, and left it there. * * * I am not aware of Ronald's knowledge of the deed from my father." As Ronald swears that he never saw the deed and never heard of it until a few years before the first trial in October, 1880, it seems a reasonable presumption from Donald's evidence that the old man having signed the deed which was witnessed by Donald, delivered it to the latter to take to the Registry office to be proved and registered. This presumption is strengthened by the fact that Graham was about to register a judgment against the old man for it appears such judgment is dated only three days subsequent to the registration of Ronald's deed, and, if the registration was the act of Donald alone ; without authority, then it was a fraudulent one, and the presumption would be against such an inference. By this registration the old man gave notice to all the world that he had conveyed the land to Ronald, and I think it is clear that he intended it to be understood that all his title had become vested in the former. Any person accepting a mortgage from Ronald would find, on reference to the books of registry, that his title was a perfect one. Smyth having taken a mortgage from Ronald, I think there was evidence for a jury that old Hugh, by his conduct in relation to the conveyance to Ronald, had induced Smyth to accept such mortgage believing the title to be vested in the former by virtue of his father's deed. Smyth was dead when the first trial took place, and we have no means of knowing what investigation he made in relation to the title, but it is reasonable to presume that he would be satisfied by a search at the Registry of Deeds office, and that such search was made. It is not necessary that it should be shewn that

old Hugh intended Smyth to act upon the assumption that the land had been conveyed to Ronald; it is enough if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, *per* BRETT, J. in *Carr v. London and North Western Railway Co.*, p. 317, L. R., 10 C. P. These issues might properly have been found by a jury from these facts in favor of plaintiff, and I think, therefore, the non-suit cannot be sustained, and, in pursuance of the authority contained in the rule *nisi*, that the verdict should be entered for plaintiffs with costs.

MCDONALD, C. J.—I do not think the evidence adduced on the second trial of the cause has strengthened the plaintiff's position. On the first trial the plaintiff failed, in the opinion of the court, to prove title in Ronald McDonald under whom he claimed. The reasons for the conclusions at which the court arrived are stated at length in the judgment delivered, discharging the rule *nisi* for a new trial, and need not be here repeated. On the points then decided, the only additional evidence at the second trial is that of Donald McMaster which is as follows:—"I am brother of the defendant. * * * I went to the Registry of Deeds office and proved the deed from my father Hugh McMaster to Ronald McMaster, his son. It was registered 17th June, 1856. I took the deed to the office and left it there." I fail to see how this testimony helps the plaintiff. The decision of the court on the former argument, was, that the deposit of a deed for registration at the office of the Registrar of Deeds, without the knowledge, consent, or authority of the grantor or grantee, was not of itself evidence of the execution of the deed. There was no evidence then, nor is there such now, of the execution of the deed by Hugh McMaster, or of acceptance of the same by Ronald, the grantee, before Hugh's death, when the title then in Hugh, vested by operation of law in his heirs. The witness Donald does not state that he took the deed to the office for registry,

at the request or with the knowledge, or authority of his father, and, so far as we are informed, he may have surreptitiously abstracted the deed from the possession of the grantor, and, without his knowledge or consent, lodged it in the registry. I have already stated my reasons for thinking, the evidence of execution by Hugh insufficient, and it is undisputed, that the grantee was, for years subsequent to the alleged registry, ignorant that any such deed had been executed or recorded. If there be no deed, there is no other evidence to support the argument for estoppel, as contended by Mr. Justice RIGBY. If there be a deed duly executed the doctrine of estoppel need not be invoked to make title in the plaintiff. On the second trial the plaintiff attempted to make title through John McMaster, who, it was alleged, purchased the land in dispute at a sheriff's sale, under an execution against Hugh, and, subsequently, conveyed to Smith, the plaintiff's testator. I did not understand this argument to be seriously pressed at the argument, and I am clearly of opinion the evidence did not sustain it. The sheriff's deed was not produced, its loss was not accounted for, nor was there any evidence of a judgment, or authority in the sheriff to make the sale. I think the non-suit was right and that the rule to set it aside should be discharged with costs.

SMITH, J.—I quite concur in the judgment delivered by my brother RIGBY, but I have one difficulty. The object, of course, of the statute in reference to the registration of deeds is to notify the public as regards the title to lands, but the difficulty that suggests itself to my mind is that there is no evidence of the execution of the deed, unless the execution is to be presumed from the fact of the deed being found in the Registry office. I must therefore hold that there is no such evidence of the execution or delivery of the deed as to make registration proof of it.

WEATHERBE, J., was not present, but it was stated that he concurred with Mr. Justice RIGBY, and that the rule would therefore drop, the court being equally divided.

WHITMAN *v.* JONES ET AL.

Before McDONALD, C. J., and McDONALD, RIGBT, and THOMPSON, J J.

(Decided April 26th, 1884.)

Obstruction of right of way.—Action wrongly brought.—Bond.—Estoppel.

PLAINTIFF and one of the defendants divided a lot of land of which they were tenants in common into two equal parts, and executed a bond or agreement in the penal sum of \$200 for the purpose of securing to each of the parties the free use of all roads existing at the time on either of the lots of land. Plaintiff having brought an action for an alleged obstruction of one of the roads referred to, and having proved no title apart from the bond,

Held, that the action was wrongly brought, plaintiff's remedy being by action on the bond.

Also, that plaintiff was estopped by the agreement from setting up prescription, but defendant was not estopped from saying that there was no grant.

Per THOMPSON, J.—The words in the bond did not amount to an easement, but, at most, to a license or a covenant not to obstruct the way.

Also, plaintiff might have proved a title to the way independent of the agreement.

This was an action brought by plaintiff to recover damages for the obstruction of an alleged right of way over defendants' land. The defendants pleaded that the way in question had been enjoyed by license, only, and that, previous to the alleged obstruction, and the commencement of the suit, the license had been revoked. The land over which the way was claimed was one-half part of land formerly owned by plaintiff and Albert Horton, one of the defendants, which land was equally divided between the plaintiff and Horton by deed bearing date May 10th, 1871, according to a plan annexed thereto, with a provision that each party was to have "the free use of all the roads at present on either of the lots of land."

At the trial of the cause before McDONALD, J., at Guysboro', May 29th, 1883, the learned judge instructed the jury to find a verdict in favor of the plaintiff, if they were satisfied that, at the time of the execution of that document, a road existed as claimed by the plaintiff, over the spot of ground on which the obstruction was placed by the defendants. The jury brought in a verdict in favor of plaintiff with twenty-five cents damages, and a rule was taken to set the same aside.

MacCoy, Q. C., in support of rule.—It is evident that the parties considered themselves tenants in common, and proceeded to divide the land accordingly, reserving to each party the use of all roads then on the land. If the plaintiff claims under the agreement, the right of way reserved is annexed to the land divided, and not other and different land. The agreement can have no stronger force than a deed would have. What is claimed is not a right of way over one lot to another portion of the same property but to another lot. (McDONALD, C. J.—The road was on the land when it was divided.) Yes, but what is claimed is a right of way from a lot of land altogether outside of the land divided. If there was a prescription before the agreement the making of the agreement put an end to any right under the prescription. The agreement does not show the direction of the roads at the time, or the nature of the user. That was a question which should have been submitted to the jury. In *21 Pickering*, 72, it was held that a party who had a right of way from one lot over another was not justified in making use of the right of way to convey produce over it from a lot adjoining the lot in virtue of which the right of way was given. (McDONALD, C. J.—You do not show that it was used for any other than a lawful purpose. THOMPSON, J.—Supposing plaintiff never wanted to use it at all the putting of the obstruction on the way was an invasion of a legal right. RIGBY, J.—My difficulty is whether it was intended to compel the defendant to keep up every road on the land which was there when the agreement was made and to give the plaintiff a right to use a road in connection with Albert Horton's land.) If it could be shown that this road was in use with the land which fell to the defendants, I admit that the action would be maintainable; but the fact is that it was used in connection with an entirely different piece of land. An easement can only be acquired by prescription or grant; it cannot be used in connection with any other land. *Washburne on Easements*, 95, sec. 41; *107 Mass.*, 492; *Washburne on Easements*, secs. 1, 2, 12 and 13; *8 Exch.*, 193; *2 B. & Ald.*, 365; *2 B. & C.*, 96; *1 Taunt.*, 495; *114 Mass.*, 382; *1 Gray*, 192; *15 Gray*, 389. Evidence of acts prior to the agreement is inadmissible.

7 C. & P., 761; 11 Gray, 477. As to what passes under the word "way,"—*Washburne on Easements*, 42, 49, 329; 1 C. M. & R., 218. The plaintiff should have re-assigned on the fourth plea limiting him to the right of way marked on the plan.

Weeks, contra, cites *Washburne on Real Property*, 239. Robert Horton, by deed, made himself, tenant in common with his son Albert, and then granted a portion of the common property by metes and bounds to Whitman. His intention, though he misapprehended his rights, was clearly to grant in severalty. A surveyor was subsequently called in by Albert Horton and Whitman, who ran out the lines in accordance with the deed, and annexed a plan on which the metes and bounds were shown. There is evidence that there was a road in existence, as claimed, at the time the agreement was made. Plaintiff had no interest in common with Albert Horton outside the metes and bounds of his deed. Plaintiff is bound by his deed previous to the date of the division and the division cannot be referred to to interpret the deed. The bond cannot qualify or extend plaintiff's previous title, which depends upon his deed. The parties never were tenants in common of anything. Plaintiff's deed did not give him an undivided half part of the land or of any part of it. The deed is clearly a deed in severalty of the part of the land it purports to convey. A right of way, where granted and not defined, may become fixed by user. (McDONALD, J.—Does the deed show a grant or estop the defendant from contending that there was a grant?) I think it does. (RIGBY, J.—Assuming the parties to be tenants in common and to make a division in which they say all roads are to remain as they are, my impression is that that refers to roads appurtenant to the land divided, and that you cannot bring in extrinsic evidence to show that there was a road in existence, at the time, leading to another lot.) If there was such a road, and plaintiff had been in the habit of using it, you must look at the condition of things existing at the time to ascertain the intention of the parties. There is no necessity that the roads should be appurtenant to any particular land. You must construe the grant under the conditions at the time according to the

intention of the parties as evidenced by their acts. The words, "ways heretofore used," will pass ways in actual use whether appurtenant or not,—*Washburne Real Prop.*, 239. And to show what ways were used, extrinsic evidence must be introduced. As to construction of the words, *1 D. R.*, 506, *7 N. & M.*, 517; *5 Bing., N. C.*, 1; *7 N. R.*, 109; *10 C. B.*, 164; *1 Taunt.*, 495; *5 Bing. N. C.*, 236.

McCoy, Q. C., in reply.—The evidence shows that the user of the way commenced and continued by permission. There could, therefore, be no prescription. *1 C. M. & R.*, 439; *L. R.*, *6 Eq.*, 36; *L. R.*, *1 Ch. App.*, 396. The deed conveys nothing, or, at the most, makes the party to whom it is given a tenant in common. The description is void, but that portion which conveys half the lot is good. The description is inconsistent with the first part.

MCDONALD, J., (April 26th, 1884,) delivered judgment as follows:

This is an action to recover damages for an alleged obstruction of a way, and the defendants having denied, by their plea, the existence of the right, it is incumbent upon the plaintiff to prove title before he can recover. The defendants being admittedly the owners of the land on which the right is claimed, the way can only be an easement which, however, cannot pass by parol, but may be acquired by grant, by user which supposes a grant, or of necessity, § *Kent Co.* 512. A right of way is, properly, neither the subject of reservation nor exception in a deed, *Durham and Sunderland R. Co., v. Walker*, 2 Q. B. 940. Assuming that it is an easement only upon the land of another, and not an interest in the land of another, and not an interest in the land, it could not be created without a deed, *Hewlins v. Chipman*, 5 B. & C. 221. In strictness of law, it is an easement newly created by grant from the grantee to the lessor, *Durham & Sunderland R. Co. v. Walker*, above cited. There is no pretence of an actual grant in this case nor of a right as of necessity; and there is no evidence of user from which the existence of a grant could be implied, the plaintiff relying solely upon title derived under the bond, which contention is an entire fallacy so far as it relates to this

form of action. The bond itself is not a grant nor the evidence of a grant, but entirely the reverse, as if the plaintiff had title by actual grant or user,—the agreement embraced in the bond would have been simply unnecessary and absurd. Moreover, I do not see that it is open to the plaintiff now to say that there was a previously existing right to the road or the use of it by grant,—he having under his hand and seal, when he signed that bond, recognized the right and title of the defendants, by agreeing to use the way by their permission, and in effect, choosing his remedy for a breach of the agreement to permit him to use it, by an action on the bond, which was made in the penal sum of \$200, and reads thus:—

“Whereas, the said George Whitman and Albert Horton, have agreed to divide into two equal parts according to the plan of survey annexed hereunto, the lot of land or farm, containing fifty-four acres, situated on the Northern side of Salmon River, in the county and province aforesaid, formerly owned and occupied for many years, by Robert Horton, and conveyed by him to the said George Whitman and Albert Horton, and the right of occupying the beach, at the head of the said Cove, for the distance of one hundred and fifty feet, from Mrs. Moses Cook's boundary, which said beach is on the lot of land belonging to the said Albert Horton, and the said parties further agree that each party is to have the free use of all the roads at present, on either of the lots of land. Now the condition of this obligation is such, that if the above bounden George Whitman and Albert Horton, their heirs and assigns, conform in every respect with this agreement then this obligation to remain and to be null and void, otherwise to remain in full force and virtue.”

It has been intimated, though not urged either at the trial or argument, that the defendant is estopped, by the agreement mentioned in the bond, from saying that there was no grant, but that view cannot be upheld, because there is nothing in the bond implying, directly or indirectly, the existence of such a grant. He may be estopped from saying that there was not a road somewhere on his lot, but not from saying that there was no grant of it, nor that it was not where the obstruction was placed. He is estopped from saying that there was no

such agreement as is contained in the bond, if this was an action on the bond, but he is not estopped from saying that that agreement was not a grant, and did not convey that absolute right to the way which is essential to support this form of action. That agreement not only does not imply such a grant, but, clearly the reverse. He may admit every thing expressed or implied in the agreement, and yet I cannot see how the plaintiff can maintain this action. If there was a breach of the agreement the plaintiff, when he signed the bond, had chosen his remedy, that is, an action upon the obligatory part of it, giving the defendant the option of paying the penalty, as it is sometimes called,—\$200—and keeping the road for his own exclusive use; and, if the defendant valued such exclusive use at ten times that amount we cannot question his right to do so, nor can we deprive him of the rights and remedies agreed to by both when they signed that bond—even though we may think that his estimate is the result of mere sentiment. It is true that if one grants a lot of land bounded on a road or way, he cannot deny that there was a road or way in the place mentioned in the grant, and his title to that road or way, as well as to the land, is by virtue of the grant by which he is estopped from averring differently from its representations or contents. *Roberts vs. Karr*, 1 Taunt 495; *Harding v. Wilson*, 2 B. & C. 99; and *Pugh v. Wylde*, 2 Rus. & Ches. 142, show all this. In all these cases, however, deeds were produced containing apt words to convey, and also defining the locality of the roads as represented. Here there is none,—the plaintiff resting his case upon a mere agreement for permissive use of existing roads the bond which shows that agreement giving the remedy, in case the permission should be withdrawn. If the road claimed, existed at the time of the execution of the bond where the obstruction was placed, of which I have much doubt, the plaintiff had his remedy, but I think he has mistaken it. This view, I intimated both at the trial and at the argument, and, having, since then, examined the law and authorities more fully, I am of opinion that it is the correct one and that the rule *nisi* to set aside the verdict should be made absolute. I may add that, even if the bond had contained statements or representa-

tions which, in an action upon itself, might operate as an estoppel the case of *Carpenter v. Buller*, 8 M. & W. 209, goes to show that in another action, such as this is, between the parties, no such estoppel would work, though the statements would be evidence against the party making them. PARKE B. said in that case: "But there is no authority to show that a party to the instrument would be estopped in an action by the other party not founded on the deed and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence. And *Young v. Raincock* 7 C. B. 338 affirms this view, and further that "where a party relies upon estoppel by deed it must be pleaded, and that if the estoppel appears on the record and the party who is entitled to take advantage of it, instead of relying on it, goes to issue on the fact, he puts the matter at large and the jury may disregard the estoppel." The verdict must be set aside.

MCDONALD, C. J., and RIGBY, J., concurred.

THOMPSON, J.—I concur in nearly all that is expressed in the judgment of my brother MCDONALD.

The plaintiff has declared solely for the interruption of an easement, *i. e.*, a right of way to which he claimed he had a title. Such a title could only be acquired in one of the modes expressed in the judgment just mentioned; but at the trial and argument no such title was set up or pretended, but it turned out that the plaintiff claimed the way by virtue of an instrument which contained, *inter alia*, this clause by way of recital: "And the said parties," (plaintiff and defendant), "further agree that each party is to have the use of all the roads at present on either of the lots of land." These words did not create an easement; they only amounted, at most, to a license or to a covenant not to obstruct the way and not to sue for its user. 'An easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one according to its duration, whereas, whatever right one has in another's land by license, may, as a general proposition, be said to be revocable at will by the owner of the land in which it is to be enjoyed.'

Wash. on E. and S., 5, citing *ex parte Coburn*, 1 Camp., 568, besides American cases. The words are not here which are necessary to make a grant, as they were in *Holmes v. Seller*, 3 Lev., 305, enabling the Court there to treat a covenant as amounting to a grant. Reservation being out of the question, because there is here no reservation in any deed of land, the technical words which are necessary to constitute a grant must appear, and then the interest in the land arises; otherwise the instrument is but a license. The fact of the instrument having a seal can make no difference in this respect, as the cases are abundant to show. It is then called "a grant of a license," or a covenant not to sue or not to obstruct; and many licenses have to be by deed. See *Wash. on E. and S.*, 39.

A practical result of the absence of granting words, is that if the way had been obstructed or injured by a third party the plaintiff could not have had the action which he would have had if he had been able to prove title to the way, and an interest in the land to the extent of the easement. The distinction, subtle though it may be called, is well established, and, therefore, the action here should have been brought,—if the license was not revocable,—for the breach of the agreement before quoted, and not for the obstruction of a way which the plaintiff had a title to.

I think, further, that defendant cannot be said to be estopped by that clause in the instrument on which plaintiff relies. To make an estoppel the agreement should either profess to be a grant or should be of such a kind that effect could not be given to it without a previous grant being presumed. The instrument did not profess to be a grant, nor did it imply a grant; it was, to the eyes of the parties, just what it is, in law, an agreement or license for the mutual enjoyment of the ways, or, at most, a covenant to do nothing to prevent that mutual enjoyment, and was quite consistent with the non-existence of a grant, and with the intention to make no grant.

I am not quite prepared, however, to agree that the plaintiff is, on his part, estopped from shewing that he had acquired a right to this way by any other right than the agreement. He has not shown any other right, so far, and he

cannot, therefore, hold his verdict; but I am inclined to think he would not be prevented from shewing that he had become entitled to the easement by a grant, express or implied, and that the agreement would then be viewed as a recognition of his right, a notice to defendants of that right, and a precaution against its infringement.

FISHER v. BISHOP ET AL.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J J.

(Decided April 26th, 1884.)

Filing bill of sale.—Delivery at registrar's house.—Neglect to index and mark; effect thereof.—Removal from office.—Attachment of goods during such removal.—Replevin against sheriff.

AN assignment was made to plaintiff for the benefit of creditors, which the assignee,—having taken possession of the estate and effects,—delivered to the Registrar of Deeds at his house, at 3 a.m., with instructions to record it as a deed and file it as a bill of sale. The Registrar did not mark it filed or file it as a bill of sale, or number, enter or index it in the book kept by him for entry of bills of sale, but recorded it in the usual way as a deed of land. It remained in his office until December 5th when it was, without any instructions from plaintiff, sent by mail to the residence of the plaintiff, who was not then at home, and who did not personally learn that the deed had been returned until the 6th January. On the 9th January plaintiff returned the deed to the Registrar. In the interval the goods were seized under an attachment, issued on the 22nd December, and an execution upon a judgment obtained 2nd January against the assignor.

Held, that the assignment was of the class requiring to be filed under cap. 84, R. S., 4th Series; that the delivering of the instrument at the Registrar's house with instructions to file was sufficient; that the removal of the deed from the office could not, under the circumstances, be taken advantage of by an attaching or execution creditor who knew of its having been in the office; and that replevin for the goods could be maintained by the assignee against the sheriff.

The following case was submitted for the opinion of the court.

The plaintiff was assignee of the estate and effects of Sidney R. Thorpe under a deed of assignment. At or about the date thereof the deed was executed in duplicate by the said Sidney R. Thorpe and by the plaintiff. One of the said duplicate deeds was also then executed by two creditors of the said Sidney R. Thorpe therein named and has since been executed by nearly all the remaining creditors.

The deeds so executed in duplicate were delivered to the plaintiff at the time of their execution and he forthwith

took possession under them of the estate and effects of said Sidney R. Thorpe. The plaintiff also on the 26th of October, 1882, at or about the hour of three o'clock in the forenoon at the house of the Registrar, and not at his office delivered the one of the duplicate deeds, not executed by any creditor of Sidney R. Thorpe, to the Registrar of Deeds for the County of King's in which County the plaintiff and said Thorpe resided, and in which County said estate and effects of the said Thorpe were situated, and instructed the Registrar to record the said deed and also to file it as a bill of sale under Chapter 84 of the Revised Statutes, Fourth Series; and the said Registrar received and accepted the said deed under said instructions. The said duplicate deed so left at the house of the said Registrar was recorded in manner and as certified by the certificate of the Registrar of Deeds under written, but the registrar did not mark it filed as a bill of sale, and did not number, enter or index it in the book kept by him for that purpose under said chapter eighty-four, nor place it in the file kept by him for bills of sale in his office. The deed delivered to the Registrar was never executed by any creditor of Thorpe. It remained in the office of the Registrar from the 26th of October, 1882, until the 5th of December, 1882, and during the interval was seen and examined by several persons to whom the Registrar stated that it was filed as a bill of sale.

The Registrar mailed the deed to the plaintiff, and it was received on the 6th December, 1882, by the same member of the plaintiff's family, who delivered it to the Registrar in an envelope addressed to the plaintiff. The plaintiff was not at home at the time the deed was received but returned in a few days after, and was home at intervals up to, on and after the 6th of January, 1883, but he did not personally learn that the deed had been returned to him from said Registrar until about the 6th of January 1883. On the 9th of January, 1883, the plaintiff returned the deed to the Registrar's office without the knowledge of the Registrar or his clerks, since when it was in the possession and custody of the registrar in his office. The deed was mailed to the plaintiff by the registrar without any instructions from the plaintiff to

that effect, and not at the instance of the plaintiff. The plaintiff resided at a distance of about fourteen miles from the registry office, and was in Kentville on the 8th January, 1883, in the morning with the deed so returned to him at a distance of about two miles from the office. The plaintiff after he became personally aware of the deed having been returned to him, could have returned it to the registrar at his office on the 6th January, and on the 8th January, and before the seizure and search hereinafter mentioned was made. On the evening of the 6th January, the creditors hereinafter mentioned, caused search to be made in the registrar's office, to see if the deed of assignment was on file therein, but the same was not on file, having been returned to the plaintiff as aforesaid, of which fact the creditors had been informed, whereupon the seizure hereinafter mentioned was made. On the 4th January, 1883, the president and directors of the Bank of Nova Scotia issued an execution against Thorpe, on a judgment which they had obtained against him on the 2nd January, 1883, and on the 22nd December, 1882, Edwin R. DeLong and Joseph Bennet, who were creditors of Thorpe for the sum of \$164.85, issued an attachment against him as an absent or absconding debtor, and under the said execution and the said attachment the defendants on the 8th January, 1883, about two o'clock in the afternoon, seized and levied upon a portion of the goods and chattels assigned to the plaintiff. The plaintiff thereupon served demand upon defendants for the goods, and, upon their failing to restore the same, he brought the present action of replevin, and the goods so seized and levied upon were replevied to the plaintiff by a coroner of the County of Kings. The president and directors of the Bank of Nova Scotia, and the said DeLong and Bennett, had notice of the existence and contents of deed of assignment, and of the fact that it was recorded in said registry office previously to their causing said goods to be levied upon and attached by defendants under said writs of execution and attachment.

The questions for the consideration of the court were :—

First. Whether the said deed of assignment as against the defendants acting under the said execution and attach-

ment required to be filed under Chapter 84 of the Revised Statutes, Fourth Series.

Secondly. In case the said deed of assignment was so required to be filed, whether the facts hereinbefore set out constituted a filing of the said deed of assignment within the meaning of said Chapter.

Thirdly. In case the facts hereinbefore set out constituted a filing of the said deed, would the withdrawal and absence of it from the Registry as hereinbefore mentioned, enure to the advantage of a creditor of the said Thorpe attaching goods conveyed by the said assignment during such absence of said deed from said Registry after the said deed might have been returned thereto as hereinbefore stated?

Fourthly. Under the foregoing facts, could the plaintiff maintain replevin against a sheriff seizing goods of said Thorpe for creditors under execution and attachment until the deed of assignment executed by two creditors of said Thorpe as delivered to the plaintiffs had been filed or recorded?

In case the court decided that said deed did not require to be filed, or that it was sufficiently filed, and that the withdrawal of it from the Registry and its absence when the said goods were seized as hereinbefore mentioned had no effect whatever to defeat the plaintiff's claim, and that it was not necessary that the deed executed by a creditor of the said Thorpe delivered to the plaintiff should be filed or recorded, judgment to be entered for the plaintiff for said goods, and for the sum of \$8 damages, together with his costs of suit.

In case the court decided that the deed of assignment executed by two creditors the said Thorpe as aforesaid, should have been filed or recorded, or that said deed required to be filed, and was not sufficiently filed within the meaning of said Chapter, or that the withdrawal of it from Registry, and the attachment of the goods in its absence after it could have been returned under the facts aforesaid defeated the plaintiff's claim against the defendant, judgment should be entered for the defendants for return of the said goods, and for the defendants' cost of defence herein. The court to have

power to remit the case to the parties for further agreement; also to have power to distribute the costs of the pleadings.

Graham, Q. C., and Borden.—Inasmuch as the assignee took possession there was no necessity for filing the bill of sale. It appears that the registrar treated the bill of sale as a deed, and instead of entering it in the book intended for bills of sale, had it copied into the book intended for deeds of land and sent the original away. The question is whether when the deed was given to the registrar, with instructions to file it, that was not enough.

Harrington, Q. C., and Roscoe, contra.—The deed was not signed by any creditor. The bill of sale was not filed within the meaning of the Act. When once placed on file it must remain there. If once regularly filed the withdrawal of the bill of sale might not affect the party, but there was no trace of it on the books; *Jones on Chattel Mortgages*, sec. 268, notes 1 and 2; 36 *American Decisions*, 239. (RIGBY, J.—The question that underlies all others is whether the recording was necessary at all after possession taken.) The filing of a bill of sale of goods is as necessary as the recording of a deed of land. (MCDONALD, C. J.—Not all all. Title to land can only be transferred by deed while it is not necessary to the transfer of title to chattels.) The plaintiff sets up title to the chattels under the bill of sale, and no other question is submitted to the court. There is no complaint of interference with plaintiff's possession, but of a taking of the goods covered by the deed. Independently of the bill of sale there is nothing but a bare transfer of certain goods to the plaintiff without consideration or reason; 32 *American Decisions*, 683; *Jones on Chattel Mortgages*, sec. 266. The doctrine of notice does not apply to creditors, but to purchasers; 13 *Met.*, 304; 1 *Allen, Mass.*, 373. Two deeds were executed at the same time one of which was assented to by the creditors and the other not. The deed to which the creditors assented should have been filed. The assignment could have no effect until registered; *Black v. Sawyer*, 2 Oldright, 1. Where a bill of sale is not delivered at the proper time and place and to the proper person all the formalities required by law must be complied with. (MCDONALD, C. J.—The case sets out the

fact that the assignment afterwards came into the office and was copied there.)

Borden, in reply.—The statute provides that the bill of sale shall be deposited with the registrar of deeds, but does not say where. There were not two deeds, but one deed was executed in duplicate. No questions about fraud or consideration arise. The simple question is whether property passed by the deed or by possession. As to the negligence of the registrar, cites *Wade on Notice*, p. 55; *Ibid.*, p. 72, secs. 152, 153, and 154; *Ibid.*, p. 73, sec. 156; *Ibid.*, p. 74, sec. 162; *Ibid.*, p. 76, sec. 165; *Ibid.*, 79, sec. 170; *Jones on Chattel Mortgages*, secs. 270, 271, 273; 110 Mass., 116; 1 B. & Ad., 873; 10 Q. B., 81. As to the effect of possession, cites *Wade on Notice*, sec. 306. There was no withdrawal of the deed from the registrar's office by the plaintiff. In the case cited on the other side it was withdrawn by the plaintiff's agent.

WEATHERBE J., (April 26th, 1884), delivered judgment as follows:

I am of opinion: (1.) That the assignment in question, not coming within any of the exceptions mentioned in the statute, was required to be filed with the Registrar of Deeds in accordance with Cap. 84, R. S., 4th Series, "Of the prevention of frauds on creditors by secret bills of sale."

(2.) No time of the day being limited in the statute for leaving the instrument with the registrar, and he having received it with the fee for filing, with direction, to file the same, which was all he could do, I think it was sufficiently filed within the provisions of the statute to prevent advantage being taken against the parties to the instrument.

(3.) Notwithstanding the registrar after having recorded the bill of sale, although he did not enter it in the book directed by the statute, sent it away from the office without instructions from or knowledge or consent of the assignee who left it, I think its absence from the office, though the assignee may have restored it as promptly as was possible, it being admitted there is no fraud in the case, could not be taken advantage of by an attaching creditor who knew of its

having been in the office and of its having been sent away while so absent.

(4.) I think that the action of replevin may be maintained against the sheriff.

Judgment, therefore, in accordance with the case agreed on, should be entered for plaintiff for the goods in question, and for the sum of eight dollars damages with his cost of suit, defendant to pay the costs of the argument.

PARKER, ASSIGNEE, v. KENNY ET AL.*

Before McDONALD, SMITH, JAMES, and WEATHERBE, J. J.

(Decided April 26th, 1884.)

Notice of meeting to appoint creditor's assignee.

Held, that where the notice was published in *Gazette* of the 19th and the meeting at which creditors' assignee was appointed was held on the 29th, the appointment was irregular and invalid, "at least ten days notice" being required by the statute.

This was an appeal from the following decision of the learned Judge in Equity :

This is a supplemental bill by Francis Parker, creditors' assignee of E. Morrison under Insolvent Act of 1875, (the original suit having been brought by a former assignee,) against Sir Edward Kenny, Thomas E. Kenny and Jeremiah F. Kenny.

The defendants and the insolvent Morrison were in partnership under articles from 1st January, 1871, to 1st January, 1873. The partnership was then dissolved by the efflux of time and Morrison repaid the defendants the capital they had in the business and continued the business on his own account until March 18th, 1879, when he became insolvent.

The bill charges that at the time of the dissolution on Jany. 1st, 1873, the business was insolvent to the extent of fully \$40,000, and that defendants knowing this fact, with-

* On the principal question which this action was brought to test there is no decision of the court. JAMES, E. J., dismissed the plaintiff's bill on the ground that the fraud upon which the bill was founded was disproved. McDONALD, J., in the court *in banc* concurred in that opinion. WEATHERBE, J., dissented from it. SMITH, J., pronounced no opinion.

drew their capital with intent to gain an unjust advantage of creditors of the firm ; that there never was any settlement of the partnership business ; that during the summer of 1872, the defendants drew on E. Morrison & Co., drafts to the amount of \$30,000 and upwards, which sum was equal to all the capital which defendants had then in the business, including a debt due from defendants to the firm on general account ; that the drafts were at short dates, and most of them matured and were paid before the dissolution on 1st January, 1873, out of the money of the firm ; that there was a deficiency in the assets of the firm of \$40,000 at least ; that the defendants knew this, and of the insolvency of the firm, and took these drafts and received this money fraudulently ; that Morrison undertook and carried on the business after the dissolution ; that the business continued insolvent, and Morrison was never able at any time afterwards to pay his liabilities in full. And the bill charges the defendants with fraudulent conduct in making the arrangement for their own protection, against the interests of the creditors.

The bill also charges the defendant, Thomas E. Kenny, who was a director of the Merchants' Bank, with fraudulently using his position as a bank director after the dissolution to enable Morrison to discount his notes at the bank, thus keeping up his credit until six years had expired, when he curtailed his credit and refused to sustain him longer, thus forcing him into insolvency as soon as Mr. Kenny considered that he would be protected by the statute of limitations from the consequence of his conduct in relation to the dissolution.

The bill also alleged that the plaintiff had obtained from the judge of the County Court an order under section 16 of the insolvent act, to authorize him to sue out conservatory proceedings to protect the estate, and to bring this suit, and prays that the payment by Morrison to defendants at the dissolution may be declared to have been fraudulent, and that defendants shall account for the same and make up the deficiency in the insolvent estate and pay the costs.

The answer alleges, and it has been proved, that in the month of April or May, 1872, the defendants gave notice to

Morrison that at the end of the two years limited in the articles, the partnership must be closed, as the defendants did not desire to be engaged in any business excepting that which they personally conducted, and Morrison then expressed the desire to carry on the business himself on his own account, the business being at that time a large and well established business and one that appeared, and that the said E. Morrison represented as likely to be profitable and prosperous and to pay the defendants the amount due them, and stated to the defendants that he had arranged or could arrange to get sufficient capital to enable him to do so, and the defendants then agreed to allow the said E. Morrison to assume and carry on said business on his own account, and he arranged to pay off the amount due defendants out of the assets of the business as far as possible during the current year, being the year 1872, so that when he should take over the business at the end of the year, the balance which he would have to pay the defendants would be largely reduced; that on 1st January, 1873, the dissolution was duly advertised; that at that time there remained only \$16,000 due to defendants which was paid off in 1873.

The answer denies knowledge of the business being in an insolvent state at the dissolution, and denies all fraud, and that the notes were given in contemplation of insolvency, and all collusion with Morrison as charged in the bill, and only admits defendants' knowledge of Morrison's losses in 1872 as having come to them after the dissolution, but alleges that at the time of the dissolution, they were induced by Morrison to believe, and did believe the business to be solvent and prosperous; altogether they admit that after the dissolution they were informed by Morrison that some adventures, not then wound up, had resulted in loss, which had made the year's business unprofitable, and that they allowed to Morrison in settling with him a large amount which they were not legally bound to allow to him on account of said losses; that the partnership affairs were settled to Morrison's satisfaction, and that they had not done or consented to anything to conceal the alleged insolvency.

The answer denies that Thomas E. Kenny's position as a

bank director was used to affect Morrison's business injuriously or otherwise.

The defendants also deny that the County Court Judge had any power to make the order under which the suit was brought, and makes the very important allegation which is not denied and is fully proved that all the debts due from the firm of E. Morrison & Co., on the 1st January, 1873, had been paid in full before Morrison's insolvency, and that the claims of the present creditors of Morrison have all accrued since that date, and on the the sole and individual credit of Morrison. The defendants also plead that all the causes of action set out in the bill did not, nor did any of them, accrue within six years before the commencement of this suit. This also is not denied, and therefore need not be further considered as matter of fact whatever may be its operation as a question of law. In the view which I entertain of this case, after a careful examination of the facts and law, I consider that it turns mainly on questions of fact, and it is necessary carefully to review the evidence.

Let me first consider the actual state of the business at the date of the dissolution 31st December, 1872. The partnership which commenced Jan. 1st, 1871, was for two years only, and would then expire from limitation of time. Early in 1872, Mr. Thomas Kenny, who was then the manager of the business of T. & E. Kenny & Co., intimated to Morrison that owing to the pressure on his time of the business of that firm, the partnership between them would be closed at the end of the year. The intention had always existed that this branch of Messrs. Kenny's business should be kept up and ultimately handed over to Morrison, who had been brought up in their establishment, and had conducted this branch of the business with success. It was a good paying business, and yielded for several years previous to 1873, from \$7,000 to \$8,000 profit yearly. In the summer of 1872, it was arranged between Mr. T. Kenny and Mr. Morrison, preparatory to the dissolution, that the latter should give his paper to Messrs. Kenny for the amount of capital they then had in the business, about \$30,000 or more. This arrangement was carried out, and the notes given in various amounts and payable at various

dates. Some of them were renewed, but the last of them were paid during the summer or early autumn of 1873, sometime after the dissolution, which was at the end of 1872.

This arrangement was made and all of these notes were given and many of them paid before there was a thought on the minds of any of the parties of any probability of the business becoming insolvent. It had always been prosperous; why should it not continue so? There was, however, a reason arising from facts occurring during the autumn, but which did not fully transpire until March, 1873. Early in the spring or summer of 1872, Morrison, against the judgment of Mr. Thomas Kenny, went largely into the West India business and met with severe losses. One vessel came back after another from unsuccessful adventures, and late in autumn, Mr. Morrison began to find out the large extent of his losses. He appears to have kept his own counsel very carefully and evidently concealed his losses carefully from the Kennys, but rumours got abroad, and he informs us that "a month or two before the end of the year I had an idea that the firm was insolvent in consequence of losses made in the West India business." Again he says: "At the end of 1872, I considered the firm of E. Morrison & Co. insolvent." And again: "In March, 1873, we found the true state of our balance, a large deficit." The knowledge of the deficiency thus came to him gradually. It did not fully exist at the close of the year, the date of dissolution, in the minds of either party. The amount of consideration was left blank in the deed of dissolution for that reason. We know now, and it was ascertained by Morrison some short time before the 20th or 25th of March, that the true loss on the business from the spring of 1872 to the time when the balance sheet for the year was finally made up, was \$26,000 independently of bad debts, and that in the latter end of March, 1873, the arrival of account sales of adventures which were still current when the balance sheet was completed, brought the losses, including the bad debts to that date, up to \$9,000 more. Of this amount \$26,000 was ascertained before that date, and at some period, presumably before that date, was included in the balance sheet as being the loss in 1872.

In his cross examination, Morrison says that he will swear that the firm of E. Morrison & Co. was insolvent at the end of 1872, but, admits that at the closing of the books in March, 1873, he first ascertained that the firm was insolvent, and adds, "I told Mr. Kenny so in March when the books were made up." So that it is clearly proved by the principal, and on this point the only witness for the plaintiff, that he himself, with all the books in his possession and in daily use and inspection, with his book-keeper at his elbow, did not have that knowledge which in the bill is charged against Mr. Kenny, on the 1st of January preceding, and on account of which he is charged with a serious fraud.

Mr. Kenny's knowledge of the insolvency is a very material element in this case. What does Morrison say? I had a conversation with Mr. Thomas Kenny about two or three months before the end of 1872 about the bad state of the business. Mr. Kenny said it was alleged that we had lost about \$50,000 in the West India business. I told him it could not be so much as that. He said the business would have to be closed at the end of the partnership. Again he says, "I told him in November, 1872, that the losses were heavy." He says elsewhere, "The firm was not solvent after they went out of it; Mr. Thomas Kenny could not help but know of that fact." But he does not say that he told him that fact before the March following, and I infer that he refers to that date, and not to the date of the deed of dissolution, which was Jan'y. 1st, 1873.

He says also: "When he spoke of closing the business at the time of the dissolution, I may have asked him to let me continue the business. I had to carry it on by force. I don't recollect previous to March, 1873, having told him I wished to carry on the business myself, and had friends who would help me." It is certain from his own evidence that he did ask to carry on the business, whereas Kenny proposed to close it. It is worthy of very serious remark in this case that Mr. Kenny's proposal to close the business, which Morrison says was made, and which must have been made or renewed in November when he was informed the losses were heavy, would, had he not at Morrison's request permitted him to

continue the business, have resulted in his having to pay out of his own pocket at least the greater part of these losses. If he knew the state of the business, and that the closing of the business would be at a very large loss to himself, (for Morrison does not appear to have been able to bear his share of the loss,) his proposal shewed an honourable desire to fulfil his obligations as a merchant. If he did not, as he swears, know or suspect the business to be insolvent until late in March, 1873, he could have had no dishonest intentions in withdrawing his capital from the business.

The above remarks are based on Mr. Morrison's own sworn statements.

I will now very briefly refer to Mr. Thos. Kenny's evidence, and I have no hesitation in saying that where his statements differ from those of Mr. Morrison, I cannot help giving the greater credit to Mr. Kenny's statements. He was very fully examined and his voluminous evidence is very clear and consistent on every point, which is much more than can be said for that of Mr. Morrison. The internal evidence is important, as in relation to all that occurred up to the end of March 1873 these two are the only witnesses. I can only give one or two brief extracts from Mr. Kenny's evidence. Speaking of his intention to retire from the business, he says:—"In 1872 I told Morrison that while my father and brother were away I had no time to give to that business, that at the end of the year the arrangement would not be renewed. He said he was quite agreeable, that he would be prepared to take the business over and pay us back all our capital that was in it; that he could get any money he required from his relations. I think that was about April or May, 1872. That determination was not the result of any dissatisfaction I had with the state of the business." Here we have the origin of what took place afterward;—all that was subsequently done was the carrying out of this arrangement made before there were any losses. "In 1872, Morrison suggested and urged some West India adventures. I was not favourable to them. He carried them on. He represented that they would be profitable. He never represented them otherwise as a whole. I do not remember having stated to

Morrison that I had heard that he had lost any such sum as \$50,000 in the West India trade. He said he thought some people were jealous of him in the business. I told him I had heard he had lost some money in the business. He replied not to give credit to that, that some people were jealous of him and that the result would show differently. We relied on his representations. Towards the close of 1872, I told him to pay off all obligations of the business so that at the end of the year he should be indebted only to T. & E. Kenny. I told him to go over his books and his stock and ascertain the condition of the business. He reported to me that he had done so and that, notwithstanding some losses in some of his West India business, the legitimate business had been very profitable," which is proved to have been the case, "and that we would still receive our usual profit of about \$4,000. The first intimation I had that we were not to get any profits out of the business of 1872 was late in March 1873, when Morrison informed me that there would be no profits for 1872; he said it was on account of losses that had been made by his West India adventures; that he had recently received some accounts of losses which produced that result, or something of that kind." We have no account given by Morrison as to the particular time when he ascertained even approximately the amount of losses. My impression from the whole evidence is that at some indefinite time between 1st January and 25th March he became aware that it was equal to over \$26,500 and that then, probably in February or March, it was entered in the balance sheet. When Morrison, in March 1873, ascertained that there was a deficiency in the business including the bad debts of \$9,000 beyond the \$26,000 entered in the balance sheets, he asked Mr. Kenny not to contribute a portion of that further loss because the whole of their transactions had been finally settled by the deed of dissolution and any further losses were payable by Morrison and not by the firm. All he asked from the defendants was a loan of \$5,000 or \$6,000 to enable him to get along. Mr. Kenny gave him more than he asked. He offered to pay the defendants' account for which of course he was liable. To this amount of \$2,362 he agreed to add a sum of \$7,368 on account of the

additional deficiency of \$9,000, making together an even sum of \$10,000 which was paid by retiring Morrison's notes given on account of the capital to that amount.

This was the last joint action of Kenny & Morrison in relation to the partnership business. Thereafter Morrison conducted the business without any interference or assistance from the defendants who did not even endorse his notes but bought from and sold to him the same as any other stranger. Morrison paid the \$16,000 balance of notes on account of capital during the summer of 1873 and he also paid all the debts due by the concern at the time of the dissolution. It was six years afterwards when Morrison went into insolvency, owing a large amount of debts, all of them contracted between him solely and his creditors, for which the defendants cannot in any way be bound unless they have been guilty of fraud before or since the dissolution. There could have been no actual moral fraud before, because Mr. Kenny was in ignorance of the insolvency. In fact in this sense there was no insolvency, for the defendants who were sufficiently substantial were liable for every dollar of the debts then due. The dissolution could not affect them. The parties claiming through the plaintiff are parties who contracted with Morrison alone after the defendants had absolutely retired in every way from the business and their retirement had been published in the newspapers. If Mr. Kenny can be held to have acted fraudulently it must have been by his conduct subsequent to the 25th March, 1873. It happened that Mr. Thomas Kenny was then and continued to be during the whole six subsequent years either President or one of the Directors of the Merchants' Bank with whom the accounts of the partnership business had previously been kept. Mr. Morrison continued his dealings with the bank up to the time of his failure and obtained large discounts there. I am asked to believe that Mr. Kenny fraudulently used his influence with the bank to procure credit for Morrison, not only until he had paid off the existing creditors of the firm, to whom Kenny was liable, but until the statute of limitations would protect him from the claims of subsequent creditors. A charge of fraudulent conduct so gross, so cunningly devised, so unscrupulously

carried out, and so long continued, a charge which, if true, would not only have rendered him liable for the amount of the deficiency, but for as many debts as Morrison chose to contract, and for all the consequences of his indiscretion and extravagance during those six years, but would have rendered him liable to the bank, whose interest he was bound to protect, and would have forever blasted his good name as a merchant,—such a charge is almost incredible. At least to sustain it, it must necessarily require to be supported by very strong and clear evidence.

It is not necessary to go into the particulars of the evidence. It is sufficient to say that Mr. Kenny explicitly contradicts the charge, and although one of the directors and the cashier of the bank were examined the result is that there is no evidence whatever to sustain the charge; on the contrary, it is completely disproved. It may be asked why did not Mr. Kenny communicate to the bank the state of the business when he ascertained it in March, 1873, and when Morrison went on discounting at the bank. Was he morally justified in keeping silence? This is a question of commercial ethics which I shall not attempt to decide, as it is not necessary. Undoubtedly he had an interest in the business until the debts were paid. If he allowed a business to go on which was sure to fail subsequently, solely in order to get himself relieved from his existing liabilities in the business, it was dishonest in the extreme, when a word from him would have destroyed Morrison's credit. But we must look at the matter as it appeared from Mr. Kenny's standpoint at the time and consider what occurred afterwards in order to ascertain his true motives, for it is upon his motives that this point of the case must turn. We must of course give Mr. Kenny credit for the natural desire to protect himself from loss if he could do so honestly. But we must consider what he knew at the time which may have induced him to believe that it was not his duty to disclose what might have ruined the business. The business had been kept up for Morrison, who was a protégé of the Kenny's from his boyhood, and he had been promised that it should ultimately be his, and it was clearly but right that it should be given to him. It is obvious and not

denied that he was very desirous, with a full knowledge of the circumstances, of continuing the business. If it was then hopelessly insolvent why did he urge that it should be given over to him? Mr. Kenny may have been influenced by a natural and commendable desire to gratify him if there was a fair prospect of success. He had known him from his childhood and had every personal confidence in him. He knew him to be capable of conducting business, that he had managed that very business for at least six or eight years with great industry and judgment and with uninterrupted success until he went into the disastrous West India adventures which had now, however, been discontinued. He knew that Morrison had doubled the profits of the business within a few years. He knew also that Morrison had some means of his own. He owned a dwelling house at Bedford and one in Queen Street, which were doubtless furnished, and Mr. Kenny states that at the end of 1871 he had made \$15,000. He had, therefore, a strong motive to endeavour to save this amount. Then Mr. Kenny knew that he had rich relations, and was assured by Morrison that they would aid him with funds, which anticipation proved correct, as Mr. Sterling advanced him \$18,000 to aid him in his business. With a large, prosperous, and increasing business, with a large stock and numerous good customers, with funds of his own and the promise of aid from his friends, and with everything to give his friends continued confidence in him and to aid him in getting credit, Mr. Kenny may well have honestly believed that in a few years he would be able to recoup his losses. Everything possible was in favour of his success. The business was about \$29,000 behind-hand and had all been lost in one year, in one branch of the business. I have no doubt that Mr. Kenny was perplexed when he found out the whole deficiency as to whether it was his duty to blow up the concern or allow Morrison to go on. If so his better judgment prevailed. Perhaps he did not look forward to what changes so long a period as six years might produce, but I think I shall shew that he may honestly have believed and I have no doubt he did believe that he was injuring nobody by giving Morrison the chance he so earnestly desired. So much for

what Mr. Kenny may have then anticipated. If so I do not hesitate to say that the result more than justified his most sanguine expectations. I have said that the Merchants' Bank discounted liberally for him. They did so not because Mr. Kenny influenced them. The discounts were settled at meetings of the Board every morning, Kenny, no doubt, being sometimes present. He may, as a member of the Board, for a little time, have felt anxiety, but not for a long time. I have said that Morrison got large credits in the way of discounts, and he was even, by the courtesy of the cashier, frequently allowed to overdraw for short periods. He was privileged over others because he sold large quantities of goods to very reliable customers. He was remarkable for his shrewdness in avoiding bad debts.

His paper was, we are told by the cashier, exceptionally good. He represented himself to be very prosperous. He kept a private ledger in a memorandum book which is now before me which he shewed to Mr. Thomas Kenny, to Mr. Gundry and probably to others. In this ledger the balances of profit and loss were as follows:—1873, \$13,500; 1874, \$11,266; 1875, \$23,000; 1876, \$10,467; 1877, \$8,186; 1878, 3,593; making in six years a total net profit of very nearly \$70,000. If these very large figures are even approximately correct they are an answer to the action. I must confess that at first they startled me with their magnitude, and I did strongly suspect that they were fraudulently made up to sustain his credit by false accounts. But there are one or two particulars of evidence to which I shall refer which satisfy me that they must be at least approximately correct, and have removed from my mind the very unfavourable impression which I at first entertained. In the first place with every other advantage I have before named, his business grew to very large dimensions. His discounts were very large indeed. McLean said:—"Previous to 1873 the largest discount of the business in any one month in the Merchants' Bank was \$4,900, but the notes were all endorsed by T. & E. Kenny. After January, 1873, the largest discount in any one month was \$53,000, that was in 1876." * * * "The cash transactions of the Merchants' Bank with Morrison &

Co. in 1876 were \$976,000, in 1877 \$910,326, in 1878, (the year of his failure), \$561,382—about half of that might be discounts. This was besides any discounts he might have from other banks, and we know that he had discounts with both the Bank of British North America and the Bank of Montreal. It is obvious with so large a business and such ample credit even the handsome profits stated in his private ledger are not at all surprising, but on the contrary extremely probable. But probability grows into certainty when we look in the private ledger to see what became of these splendid profits which ought to have left Morrison, instead of being a bankrupt in March 1873, the owner of a handsome surplus after paying off the original deficiency. It is known to everybody that the most injudicious investments that could possibly be made half a dozen years ago would be investments in real estate and ships. I turn to his real estate. We have here in this private ledger an account of each property, of their cost, let us bear in mind, over and above the mortgages:—Bedford, \$4,494; Market Wharf, \$27,649; Queen Street house, \$2, 679; Barn at Bedford, \$750; Hendry Property at Bedford, \$218; Brackett property, \$1,023; Shares in Academy of Music, \$500; Duggan property, Bedford, \$330; McKenna property, Dartmouth, \$3,602; Property in Veith Street, \$612; Lawson property, Bedford, \$695; Flynn property, Bedford, \$1,854; Keith property, Bedford, \$1,781; Currie property, \$850; Lockhart's property, \$1,000; Ship-yard, Bedford, \$1,471; Elliot property, Dartmouth, \$5,600; Innis property, \$400; Cullen's property, \$1,000; DeBay property, \$450. Total, \$54,043. Several of these properties appear to have been subject to mortgages; all those in his own use and occupation, for instance, we know were so. It is impossible for me, of course, to estimate the cash value of these properties, but I would not be surprised on looking at the above list to be informed that by far the greater part of the above \$54,000 would fail to be realized,—probably nearly all of it.

Then we find that he had invested in the barques *Sarah*, \$5,216; *Lulla*, \$7,033; *Maggie O'Brien*, \$6,291; *Osmond*, \$4,455; total, \$19,599. Thus we have invested in real estate and shipping no less than \$73,000. We have here, I think,

the explanation of what became of a large part of Morrison's large profits from 1873 to 1883. We find \$70,000 of profits and \$73,000 sunk in more or less improvident investments, such speculations as a man with a large business depending on the bank for assistance should never have entered into. In all probability enough was sunk in these two classes of investments alone to have covered the whole deficiency that existed when the defendants withdrew their capital at the end of 1872. Are the defendants in any view of the case to be held responsible for Morrison's imprudent investments after they had ceased to have any control of the business? Had he not entered into them; had he displayed the shrewdness he exhibited before he went into the West India business, I have no doubt that he would have weathered the commercial depression, which must have ruined many of his customers, and which carried down so many cooler headed and more cautious business men than himself. As it is, I can have no doubt that Mr. Kenny's estimate of his probable success was fully justified by the event, that he was entitled to the credit he received at the Merchants' Bank, except so far as his speculation in real estate and shipping ought to have diminished his credit. I am satisfied that Mr. Kenny was justified in not attempting to injure Morrison's credit, however much he may have been perplexed as to his duty in not stopping it at the outset, which is the most that can be fairly alleged against him, and that the loss sustained by Morrison's creditors are due not to any moral fraud, or even to any recklessness or want of judgment on the part of Mr. Kenny, but to Morrison's unwise investments of capital he ought to have employed in his business. He says in his evidence, "from the time of our dissolution to the time of my suspension, I was about in the same position, having substituted new creditors for the old ones." This is at least a very uncandid statement in view of the above facts.

It appears to me that they afford the most complete vindication of Mr. Kenny's conduct at and since the time of the dissolution. I am obliged to pass by many minor points arising on the evidence, but there is one to which I ought to advert, although it has little or nothing to do with the matters

in question in this case. Mr. Gundry, manager of the Branch of the Bank of Montreal in this city, was brought for the plaintiff to prove that in 1878 he opened an account with Morrison and discounted for him considerable amounts, whereby Morrison became largely indebted to the bank, and that he was induced to give this credit to Morrison by uncandid or false statements made to him by Mr. Thomas Kenny to whom he applied for information. The substance of the charge is contained in the following extract. "He told me that he had left the firm because the business was too large and he could not attend to it. He did not tell me that the firm of E. Morrison & Co. was insolvent when he left it. He recommended my taking the account on the ground that there was something in what Morrison had stated as to his paper, but not because they wanted to get rid of the account. He distinctly stated that they did not wish to get rid of it. I then opened an account with Morrison. I had many conversations with Kenny about Morrison's position and he always told me that Morrison was perfectly good or words to that effect. He told me that the only possible contingency that could affect Morrison would be his death. Those conversations took place until the time of the failure." In cross-examination he says; "Morrison's account with me was chiefly discounts. He deposited cash and bought exchange. I did not discount any paper for him that I did not consider good." * * * He says also that Morrison once showed him a private ledger showing the balance to his credit in five figures. So that it appears that he did not, at least not exclusively, rely on Kenny's statements but exercised caution and care to obtain the means of forming an independent judgment. With reference to this I ought, at least, to notice the fact that Mr. Kenny in his evidence largely modifies the effect of his statements, and that he denies having used some of the expressions attributed to him. Had he left Gundry's evidence without any special contradiction, it would not have affected my judgment on the case, as Kenny distinctly says, "I did not know that the firm of E. Morrison & Co. was insolvent from the time we went out until his calling his creditors together. I believed Morrison's

assurances that he was doing well." And if he looked at the profit and loss account in the private ledger without scrutinizing carefully the real estate and shipping accounts, he might well have made, in substance, the statement attributed to him by Gundry. I think the difference between the two gentlemen is not due to want of candor on either side. In the view of the facts of the case which I have adopted from the evidence, it will not be necessary for me to refer at large to more than two or three of the cases cited. The first case cited by plaintiff was *Anderson v. Maltby*, reported in 4 Bro., Ch., Cases 423, and 2 Ves., Jr., 244, 248. It was put to me as a case very nearly resembling that before me. In 1774 upon the dissolution of the partnership of Dyer, Brough, Maltby, and his son Thomas Maltby, a new partnership commenced between Brough, Maltby, and his two sons Thomas and George Maltby and the sum of £6,200, the capital of Thomas in the former partnership, was brought into the second to his account. In four years (1784) Thomas retired. In four more years (May 1788) the house suspended payment, and in November of that year went into bankruptcy. Under the commission Thomas Maltby claimed as a creditor for £3,628. The bill was filed by the assignees of B. & G. Maltby against Thomas, praying an account of moneys received by him, and an account of his share when he retired. By the evidence and answer it appeared that when Thomas retired the partnership was in a very embarrassed condition. Bently, a friend who had lent them £20,000 without interest, and from whom they had considerable expectations, died without answering those expectations, and there was reason to apprehend that his representatives would call in the money. No examination of the books, valuation of the property or calculation of the debts took place when Thomas withdrew, nor was any public notice of the event given otherwise than by changing the name of the firm in the books of the Bank of England and other books from "Maltby & Sons" to "Maltby & Son." After Thomas went out an account was made out and continued from time to time, the figures of which were not taken from the books. When he retired he had drawn out of the partnership £3,904, and afterwards received on the

account from the remaining partners £9,467, the last payment of which was made a few weeks before the failure. This account was held by the Lord Chancellor to have been made up fraudulently. The defendant admitted in his answer that, having reason in July 1774 to suspect the house to be insolvent, he resolved to quit it for that reason.

Several broad distinctions between that case and this are apparent at the first glance. I will state some of them briefly. In the language of the Lord Chancellor: "Two circumstances struck me at first as singular. It is a case of very large payments made during the short period of two years in the partnership of the father and one son springing out of the partnership of the father and two sons. Above £9,000 was paid out of the cash of this partnership in that short time. £17,000 is pretty near the amount which the defendant, if all his claim is allowed, will have got out of the partnership. It requires some explanation to account for the passage of so much money between such near relations. The former partnership was not concluded in the usual way of investigation of accounts and estimate of the stock and the share of the retiring partner. * * * In the books there is no account taken as between the partners at the period of the dissolution—the books are blank as to that." An account was made up afterwards, but not entered in the books, allowing defendant $7\frac{1}{2}$ per cent interest from the commencement of the partnership, with an annual rest instead of profits, but the evidence showed there were in fact no profits. "Unless there is a real profit on the books it is allowing him nothing. It is moonshine, and the whole account was a mere fictitious account; but all these accounts go for nothing. They are both erroneous and made upon a false and fraudulent principle. The defendant admits that he had reason to believe the house to be in an insolvent position on July 1st, 1784; that he quitted the house because he was dissatisfied with its situation. He states the transaction of the loan from Bently. * * * And having reason to suspect it to be in an insolvent state he determined to quit it and seek payment from Brough and George Maltby. * * * "No valuation was taken of the outstanding debts, no enquiry made with regard to them."

He says :—" If all this transaction is to be viewed under the colour in which it presents itself to me, it is an imposition, not on them, (the other partners) because they were consenting, but upon the creditors." He speaks of the arrangement as contrived upon a certain foresight of bankruptcy at no very remote period, though the exact time was not certain, managed between persons of the same family by which the creditors of the two have been losers exactly to the amount of what he has received." The above extracts are from the report in *2 Vesey, Jr.* In the same case in *4 Bro., Ch., Ca.*, the Lord Chancellor stated in addition to the above that there was no deed of dissolution, that the change of partnership was solely notified by silently leaving out the letter S, making the name of the firm T. M. & Son instead of T. M. & Sons. It is true that the Lord Chancellor decreed an account. He stated during the argument that he must necessarily do so if only to reduce the amount fraudulently stated in the account.

It is needless for me to remark on the case further than that all the particulars I have extracted from the chancellor's judgment were elements in forming that judgment, and if we take these grounds out there is very little left,—nothing at all having any material bearing on this case. The conduct of the defendant was fraudulent, and his claim based on fraud. This is all that I understand by the case. The relation between that case and this is not that of comparison. There is no comparison. It is a relation of contrast. There is not a word in all the extracts I have given, comprising some seven or eight grounds of objection to the defendants' conduct, which could with any semblance of truth be said of the conduct of the defendants in this case. One vital distinction was pointed out by Mr. Ritchie at the argument. In this case the partnership expired from effluxion of time. There was in fact no retirement because no continuance of the firm. It was at end and Morrison started a new business for which Kenny was in no way responsible unless he was bound to publish to the world information as to Morrison's financial position when he himself considered it sufficient to warrant him in going on. I do not think that this case at all sustains the plaintiff's contention on the merits of this cause, but quite the contrary;

nor is there any other that could afford a pretence of such conclusion. I may add that the headnotes in both of the reports of this case are extremely misleading, and are not in my opinion at all borne out by the judgment of the court. The principle of this case was considered in the *Ex p. Peake*, 1 Madd. R. 346. The Vice-Chancellor in giving judgment asks: "May not one partner dissolve publicly his partnership with the other, he knowing the then state of it, but having a better opinion of it, choosing for his own advantage to give a sum of money if the other will convey his interest to him?" p. 351. Cites *Anderson v. Maltby* and remarks upon it. "There was strong ground to believe that a fraud was intended and it does not warrant me in declaring generally that the mere circumstance of the business being at that time in such a state that their joint effects were not sufficient to pay their debts, will be sufficient to invalidate a dissolution of partnership made fairly between the parties themselves. The Vice-Chancellor on this ground distinguishes *Anderson v. Maltby* from the case before him. And in *Ex p. Birch* and *Ex p. Brown*, 2 Madd 260 n. (66) Lord ELDON considered the ground of *Anderson v. Maltby* to be a fraudulent design to draw in future creditors and thereby pay the withdrawing partner; that if the case was to be understood, as might be collected from one passage, that a man who is indebted to a partnership cannot retire from it unless he sees that there is an effectual fund in the circumstances of the partners and their property as such to pay all the debts then due, that proposition could not be safely entertained; that to make out a case for the relief in *Anderson v. Maltby* the transaction must amount to satisfactory evidence of the intention originally conceived founded in fraud of future creditors to pay the withdrawing partner. I think I may safely assert on the authority of these two cases that, in the clear absence of all fraud in the case before me, there is nothing in the case of *Anderson v. Maltby*, when the language of the Lord Chancellor is fairly construed, to sustain the plaintiff's position in this case and if there be, so much of that decided as appears to sustain the plaintiff's case is distinctly overruled and the position of the plaintiff derives no support whatever from the case

of *Anderson v. Multby*. I purposely refrain from deciding this case on the plea of the statute of limitations, as it would not be doing justice to the able arguments presented to me on both sides of the case, during an argument of four days, were I to decide it in favour of the defendants on so narrow a ground. I have no doubt whatever that it is my duty to dismiss the bill with costs.

The appeal was argued January 25th, 1884, by *Eaton, Q. C.*, and *Harrington, Q. C.*, in support of appeal, *Ritchie, Q. C.*, *Graham, Q. C.*, and *Henry Q. C.*, contra. The argument consisted almost wholly of an analysis of the evidence, and is therefore omitted.

MCDONALD, J., (April 26th, 1884,) delivered judgment as follows:—

The charge of fraud brought against the defendants, and which lies at the foundation of this action, is of so grave a nature, so difficult to believe capable of being concocted and carried out as alleged in the bill, and, if proved, would have been so fatal to the personal character and business standing of the defendants, that, without doubt, it needs strong evidence to support it—stronger, as I think, than was produced. The plaintiffs had a legal right to make their charges and bring their action, and it is not for us to question the propriety of their doing so, in view of the facts in evidence, and I am willing to believe that when they did so, they supposed that, at the proper time, the necessary evidence would be forthcoming; but I cannot very well understand why this appeal should be taken after the evidence was all before the court and the parties, and its inadequacy pointed out so clearly by the Equity Judge in his judgment. After hearing counsel for days I have carefully looked over the whole case to see if there was any evidence which, by any possibility, could support the plaintiff's claim, and am at a loss to discover how the learned Judge could have decided otherwise than as he did. If he had done so I cannot help thinking that his judgment would necessarily be set aside. The cases cited by the plaintiff's counsel are not, by any means, analogous to this, and one fallacy is in assuming that the defendants were bound, in law or equity to continue the

copartnership after the time first limited for its duration had expired in law, and calling their not so continuing a fraudulent act or any evidence of fraud. No such case was cited. The main features of this case are so fully and clearly set out by the learned Judge in Equity in the judgment appealed from that it is not necessary to repeat them now ; and, with a few immaterial exceptions, which do not affect the discussion in the slightest degree, I fully concur in both his observations and his conclusions. I may add that even if there were evidence to support so grave a charge as that preferred against the defendants, of which there is not a particle, they might well rely upon the legal objections taken in their answer at the hearing and at the argument. One of these objections is that while the statute requires a notice of the meeting, at which the plaintiff assignee was appointed to be given "at least" ten days before the time appointed for holding it, the evidence is that the notice was published in the *Gazette* on the 19th and the meeting held on the 29th—leaving only nine days "at least" ; *Rex v. Justices of Shropshire*, 8 Ad. & El., 173 ; *3 Neville and Perry*, 286 ; *Mitchell v. Foster*, 9 Dowl., 527. Another fatal objection was that the bill or declaration throughout treats the creditors, for whom the assignee is acting, as those of *Morrison & Co.*, whereas it is now admitted that they never were such creditors, and we are asked to give relief to persons who are not brought before us by the bill or otherwise. And still another fatal objection is that the firm's insolvency, which is made the basis of this action, was never established, but, on the contrary, it clearly appears by the evidence that the firm never was insolvent at all. Not one of the cases cited at the argument on behalf of the plaintiffs is in point because the facts are entirely different, and therefore it is not necessary to refer to them.

JAMES, J., concurred.

WEATHERBE, J.—This is an appeal from a decision of the learned Judge in Equity in a suit brought by the assignee of Edward Morrison, an insolvent, against members of the firm of T. & E. Kenny to render them liable in consequence of the dealings of a member of defendant firm on behalf of the

defendants in relation to the business of Morrison while he was in partnership with defendants and afterwards. There is little dispute as to the facts. Defendants were members of a long established wholesale dry goods firm in Granville Street in this city,—T. & E. Kenny. Morrison had from early years been their clerk. A separate business was commenced in 1869 or 1870 on the Market Wharf. Morrison was to receive one half the commissions and the capital was supplied by defendants. The business was carried on under the name of E. Morrison and prospered. On the 1st January, 1871, defendants entered into articles of co-partnership with Morrison, for a period of two years, under the name of E. Morrison & Co. The name of defendants did not appear and they were never advertised. The former capital of the business, under the name of E. Morrison, was to remain, with further sums to be advanced, as the capital of the new business on which defendants were to have interest. The net profits were to be divided equally, but neither party was to draw more than one-half the profits. Defendants had a right to dissolve at any time. It may, I think, be admitted that there were profits for the first of these two years, but in the second year the business was unprofitable. It went rapidly behind-hand during the year. The managing partner of defendants' firm was Thomas E. Kenny, and he seems to have exercised practically what the agreement authorizing defendants to dissolve at will and giving him control of the business of E. Morrison & Co. empowered him to do. It must, I think, be taken to be the fact that he knew the general condition of the business day after day and he must have known that it was going behind-hand. This was owing to Mr. Kenny having permitted Morrison to launch suddenly into ventures in the West India trade in which he was inexperienced. When the firm of E. Morrison & Co. entered upon this West India business persons outside predicted that great losses would be the result, and rumour of this or something equivalent to this,—it was contended that they were rumours of actual losses, but Kenny could have looked at the books and detected this in a very short time,—these rumours of unprofitable adventures were discussed

between Kenny and Morrison. This being the state of the case in the summer of the second year of the new partnership business when financial troubles were actually, or when they might reasonably have been anticipated, Kenny commenced to withdraw the capital which by the terms of the agreement was to yield interest to defendants out of the first profits of the business, and which was, I think, necessary in and constituted the very essential element of vitality to that business, without which there was no commercial foundation whatever. That capital then was drawn out in contravention of the terms of agreement which, I think, showed an intention that it should remain while the contract was in force. It amounted to \$35,000 and it was all withdrawn by notes discounted in the Merchant's Bank, taken between 1st July and 30th December, 1872, and it is now clear that at the end of that year there was a loss or deficiency in that business to the extent of about \$35,000 counting the bad debts. I am not aware that we can say what the exact amount of assets was,—an examination of the books showed liabilities \$158,000 and assets \$100,000—but there were debts to the extent of \$35,000 which there was nothing to meet. As between the parties half the loss would fall upon each party. The separate estate of each was liable for the debts due by the firm. So that practically if the concern should have been at that period closed and Morrison had nothing to respond as between defendants and the creditors, defendants would have been obliged to have restored the capital withdrawn and it may be a further amount. The exact figures are not necessary, I think, to be dealt with in the present discussion. The concern was hopelessly insolvent, and the extent of its insolvency was due to the withdrawal of amounts made by notes or bills of Morrison in favour of defendants already mentioned as follows:—July 1st, 1872, \$2,000; July 24th, 1872, \$2,500; Sept. 7th, 1872, \$3,000; Sept. 23rd, 1872, \$4,000; Nov. 11th, 1872, \$4,000; Nov. 20th, 1872, \$4,000; Dec. 2nd, 1872, \$6,000; Dec. 30th, 1872, \$6,000; total, \$35,000. The defendants, Sir Edward and Jeremiah Kenny, took no part in the business. Thos. E. Kenny was the manager of both concerns and he was also president of the

Merchants' Bank in which all the notes mentioned were discounted. A written agreement of dissolution between defendants and Morrison was executed at the end of 1872 and after this period Morrison conducted the business alone. The bill charges that Thomas E. Kenny as president of the Merchants' Bank contrived that Morrison should be sustained in carrying on the business by that bank, and that Morrison should be kept commercially afloat until a new set of creditors replaced the original ones and six years should elapse and then that he should be left to shift for himself. The business certainly did go on in the name of Morrison for upwards of six years till the insolvency which led to these proceedings. Morrison says, in his evidence, that during the whole period which elapsed between the withdrawal of the capital and his suspension he remained in the same state of insolvency. There is not much in the evidence to guide us as to how far Mr. Kenny knew of the losses of 1872 at the time they were taking place, and there is no reason why we should not take his statement which would indicate that he was not aware of the actual condition of things until March 1873, but there was nothing to prevent him from knowing all that Morrison could know at any time. Assuming that Morrison exaggerated everything favourable and was silent as to the worst, there is nothing, I think, to show that he wilfully refused to disclose any information required. Probably both parties were reluctant to look the approaching disaster squarely in the face. In the light of the law governing the case all this makes very little difference one way or the other. It is clear there were signs to both, early in the summer, of probable misfortune and we have the very dates and amounts already given of the withdrawal of the capital by defendant. Now it is true there was an established custom,—the West India branch was not to be thought of,—but there was the good will of the other branch of the business and Morrison was willing to go on, but how could so hopeless a thing be undertaken. Could defendants assist? We ought to admit that since Morrison had always succeeded, except from inexperience in the West India adventures, that defendants hoped he might again establish himself. I adopt the theory of the defence.

Defendant had one of two courses, either to pay the debts of E. Morrison & Co. and retire all the notes in the Merchants' Bank, or prevent disclosure of the losses and assist Morrison to go on. Notwithstanding the agreement of dissolution by which Morrison had waived the act of withdrawal of the capital and agreed to accept the assets and pay the debts, defendants agreed to retire notes of Morrison to the extent of upwards of seven thousand dollars which Morrison was entirely unable to pay. It must be obvious that this would be useless to keep the insolvent concern floating for many days. There was, it is said, hope of assistance,—I think by way of notes for the Merchants' Bank,—from a friend of Morrison,—one Sterling,—and it was suggested he might get "a partner." There was nothing evidently forthcoming at this time,—nothing available,—to justify the continuance of the business for the very shortest period. Morrison, doubtless, had hopes of assistance from the Merchants' Bank. Hitherto the credit in that quarter was upon the standing of defendants. It may be that Morrison hoped that might still be relied on. Without the aid of that bank Morrison swears he would be obliged to suspend. I think there is no evidence whatever to justify us in holding that any thing was promised by Thos. Kenny whatever of assistance directly or indirectly from that quarter. At any rate I am willing to adopt defendants' contention on that point. I think there was nothing in plaintiff's evidence to call for an express disavowal of any promise by defendants or any agreement to use the bank. It may be fruitless to enquire as to the motive which inspired the letter prepared by Mr. Kenny for Morrison's signature at this crisis. It is sufficient to say that it was prepared by the defendant, T. E. Kenny, and addressed to defendants. The draft was furnished to Mr. Morrison :—

26TH MARCH, 1873.

DEAR SIRS,—It was only on Saturday last that I ascertained that last year's business, instead of yielding for you a profit of \$4,000, as I stated and then believed, has been attended with heavy loss, owing to West India trade. These losses I feel bound in honor to make good to you and only

now ask you to assume say.....	\$7637.78
making with at your debit.....	2362.22

\$10,000.00

said \$10,000.00 to go to reduction of my notes to you.

The notes to you I will reduce as speedily as possible, and if my business continues as good for the year as it has been these dull months since January 1st. I hope to be able to reduce the amount largely by the end of the year.

I have obtained \$4,000 from my friend Mr. Sterling and have asked him to assist me further; when I secure that I will be in a position to pay speedily obligations in full.

I purpose placing in your hands a policy of assurance on my life for \$6,000 as an earnest of my desire to secure you from all loss on the capital you entrusted so kindly to my management.

Yours truly,

EDWARD MORRISON.

This was evidently signed by Morrison with reluctance. Kenny says, "One object of that letter to my mind was to have it as evidence to protect me from further claim." It was copied from Kenny's draft by Morrison in his own office and sent with this note:—

DEAR MR. THOMAS,—I send the letter required cheerfully, but the office is so full of people that it is a worry to write or think. Will you kindly see Dun Wiman and say that they need not put mortgage notice; I want all the capital I can to do the trade—same is certainly quite legitimate. Will you confer with me before writing Howland, if it be necessary at all?

As soon as I get the life policy from Allison will transfer.

Yours,

E. M.

You might say you advised me to get the money.

E. M.

There was at this time outstanding and unpaid by Morrison a number of the notes representing the amount withdrawn from the business. These were not all retired in the Merchants' Bank for two or three months after the period, according to Morrison, but I think the payment by renewals

extended over a much longer period as appears by Mr. Kenny's evidence. The following paper was put in evidence for the defendants and Morrison did not seem to understand it when put in his hands. I understand from defendants' counsel that it represented renewals of the notes outstanding for the alleged capital withdrawn.

HALIFAX, April 1st, 1873.

Proposition of E. Morrison for the payment of the following notes due by him to T. & E. Kenny, viz:—

\$3,600, due April 9th, 1873; \$500, due April 11th, 1873; \$500, due April 21st, 1873; \$500, due May 4th, 1873; \$500, due June 4th, 1873; \$400, due Oct. 1st, 1873; total, \$6,000.

I agree to pay off these notes as follows, viz:—

\$2,000, on or before Oct. 1st, 1873; \$2,000, on or before Jan. 1st, 1874; \$2,000, April 1st, 1874.

I further agree to pay the interest on the renewals of all these notes; and all purchases that T. & E. Kenny have made, or may make, from me or my firm shall stand against such notes.

EDWARD MORRISON.

I think, that after the dissolution Morrison's negotiable paper, except I suppose that in paper K, was discounted at the Merchants' Bank without the name of defendant. I suppose we have nothing to do with the question here as to moral obligation resting on Thos. E. Kenny, as President of the Merchants' Bank, to disclose the state of the business of Morrison, but it will not now be denied that without the aid of the Merchants' Bank Morrison could not have gone on and defendants would not have been paid. Morrison swears that from the time of the dissolution to his suspension he was in the same insolvent condition, having substituted new creditors for old ones. His books, I understand, show this. It must be evident, therefore, that money obtained by transactions with new customers was transferred to defendants in retiring the notes drawn in their favor, and debts which defendants would have otherwise been required to pay were paid by money realized by creating new obligations, and these obligations were discharged by Morrison by again incurring

debts, and these proceedings were repeated for more than six years. The bill charges that this was all contrived and carried out for the defendants by Thos. E. Kenny to relieve them and save their capital, but I will adopt Mr. Kenny's version :—

Thos. E. Kenny says :—" In March, 1873, when Morrison showed me the state of his accounts, I did not communicate that to the directors of the Merchants' Bank; they never knew from me that Morrison was insolvent, because I believed that he could recoup himself for his losses, that he had a good set of customers and was careful in his credits, and he had submitted to me a memorandum of the reductions he could make in his business and personal expenditure, reducing them from what they had been. Before March 1873 I believed it was impossible for Morrison to make up his losses without outside assistance. If I had known that Morrison could not have got that money from Sterling I should have judged that he was insolvent. After March, 1873, we were in the habit of frequently meeting, and he was frequently speaking to me of his business, especially in 1873, 1874, and 1875. At the end of 1872 I imagined that all the speculations of E. Morrison & Co. had been closed. I did not ask him if there were any outstanding adventures.

The above answer was in reply to the following question from Mr. Rigby: Did you communicate to the directors of the Merchants' Bank the fact that Morrison was insolvent if he got no assistance from Sterling?

I am disposed to assume that he considered it possible for Morrison to restore himself to a state of solvency. No one sees how he could go on. The business, to use the expression of the Lord Chancellor in the chief case relied on at the bar for plaintiff, "was all moonshine." There was nothing in it. It was worse than nothing. Mr. Kenny would not endorse,—no prudent man would endorse the paper or give any credit whatever. There is no pretence of a denial that this was the state of the case, and it would be worse than a useless operation of the mind to ignore it. Then how was Morrison sustained? Mr. Kenny promised nothing, nor did he, as far as the evidence goes at this time, make any application for

Morrison, or representation to the Merchants' Bank. Defendants had gone out of the concern with as little publicity as they had come in. The learned Judge in Equity says the dissolution was "published in the newspapers." The business, at first on the Market Wharf, was for several years, as mentioned, carried on in the name of E. Morrison; then for one year as E. Morrison & Co. There never had been a public announcement that defendants had anything to do with it though that was probably known to or supposed by many. There can hardly be said to have been a publication of the dissolution in the newspapers. Morrison caused one insertion to be made in the *Royal Gazette*, a paper notoriously little seen in the business community, of a notice that the partnership of E. Morrison & Co. had ceased by effluxion of time, and that he would continue the business assuming the liabilities and receive payment of debts due. That is what I understand to be the real state of the facts. The directors of the Merchants' Bank may or may not have been aware of the change, of the notice, and of the full signification of the notice. We have no evidence of it. It is clear they were entirely ignorant of the insolvent condition of the new concern, and in some way Morrison succeeded in carrying himself along by the aid of that institution for six years. Previous to 1873 the largest amount of notes discounted for E. Morrison & Co., with defendants' names in one month was \$49,000. After 1873 the largest discount for one month without defendants' names was \$53,000. The paid up capital of the bank is \$900,000, and after the withdrawal of defendants, though no enquiry is shown to have been made as to Morrison's circumstances, he became the largest debtor of the bank, his discounts at one time reaching the sum of \$190,000. His cash transactions, one-half of which were for discounts, amounted in 1876 to \$976,000; in 1877 to \$910,326; in 1878 to \$561,382. He was in the habit of overdrawing from \$4,000 to between \$5,000 and \$6,000, and at one time overdrew \$13,000, for which notes were discounted the next day. The Merchants' Bank, without which Morrison says he could not have gone on, carried the concern till within five or six months of the failure, and then they began "to close down on

him." They got into the habit of throwing out his paper for a year before his failure. He sometimes spoke to Mr. Kenny about this and then a change in the treatment would follow for a short time. Mr. Kenny is charged with having been the instrument in fraudulently shifting a large part of the burden from the Merchants' Bank to another,—the Bank of Montreal. The agent of the last-mentioned bank was applied to for credit in 1878. Previously Morrison had suggested to Kenny that credit might be got there. A former agent had offered to discount some paper. In a private note to Mr. Kenny Morrison informs him of this offer and adds:—"I told him I had done all with Merchants,—would it be any object?" No credit was given at that time. Mr. Gundry, agent of the Bank of Montreal about the time that Morrison says the Merchants' Bank "began to close down on him," applied to Mr. T. E. Kenny to ascertain the state of Morrison's business, and he says that he had a long conversation with Mr. Kenny extending over an hour, the result of which was that his bank undertook to discount for him, and that bank is now one of the largest creditors. If what Mr. Gundry says is true there was a direct misrepresentation by Mr. Kenny, but I propose, since it is not necessary for me to do so, not to decide between the veracity of these gentlemen. I propose to adopt those facts which are uncontradicted. It is not denied, I think, that Mr. Kenny was interrogated as to the whole state of Morrison's business and his former relation to the defendants, and Mr. Kenny, though he knew the object of the enquiry, did not disclose that which he must have known would have at once prevented Mr. Gundry from crediting Morrison, without, at any rate, an investigation of his affairs. It was argued that Morrison had deceived Kenny by representing that he was making money and there was no necessity for raking up the past. According to the view I take I am assuming he showed him a fictitious statement of his affairs, but Mr. Kenny himself never undertook to give any credit on such statement nor did the Merchants' Bank act upon such a representation, nor was any enquiry made into the position of Morrison's affairs.

I think it cannot be contended,—it was not contended at the bar where a very lengthened discussion took place,—that

anything which I have adopted in this view of the facts is in any respect erroneous. I adopt generally the facts not controverted by counsel for defendants, and I leave out of the case all the material contradictions. Most of what I have thus summarized is in black and white and I doubt if we can in any way avoid the conclusion which this statement of the case leads to. The burden of proof is on the plaintiffs, and the defendants are entitled to have the full weight of anything that can be urged on that ground. I concede all that. The law relied on by plaintiff is to be found in the case of *In re Kempton*, L. R., 8 Eq., 286; *Anderson v. Maltby*, 2 Ves. Jr., 244, and in *Ex parte Buch* and *Ex parte Brem* there cited in a note. From these cases, without going at length into the question, I think a reasonable construction must bring us to the conclusion, (1) that a partner cannot withdraw from an insolvent firm or one that has engaged in adventures which end afterwards in loss; (2) that it is immaterial whether at the time of withdrawal he is aware of the insolvency; (3) that whether by mere passive acquiescence or active efforts he permits new creditors to be drawn in after such withdrawal the effect of which is to place the money of the new creditors in the pocket of the retiring partner and save him from loss which he would be otherwise subjected to, he cannot retain that money as against these creditors. All this, I think, is clear, and the first set of substituted creditors would have been, I think, entitled to relief against the defendants. It may be said, and it occurred to me at the argument, that a retiring partner in a case of this kind, with ample means to meet all liabilities, might run the risk of permitting such a business to go on with the design of bringing in a new set of creditors without disclosing the insolvency, provided he stood ready to pay all liabilities unless the remaining partner succeeded in becoming solvent. And I think if that had occurred in this case defendants' responsibility would have ceased; but I am doubtful in a case of this kind, which in some aspects is peculiar and unique, whether the dissolution can take effect while the insolvency which arose during the time of or from the effects of the withdrawal exists. At any rate I am led to think that, whether it can take effect or

not as against creditors of the actively continuing partner, the retiring partner cannot be relieved. Nor do I think he can be relieved while the insolvency exists and new debts are created out of which the former ones are being discharged. That I think,—though I do not pretend that it is not a difficult question,—is the case we have to decide, and I gather from the judgment appealed from that this was the question which presented itself to the learned Judge in Equity. But he, it appears to me, went upon the ground that the solvency had been restored, although there is something in the judgment appealed from to the contrary. Morrison distinctly states that the insolvency continued—that it continued thus entirely through the aid of the Merchants' Bank, and that the whole operation during the six years of the existence of the business was a mere substitution of new creditors for old ones. The learned Judge styles this an uncandid statement, but the books are all in evidence, and it was easy to show the real state of the case if this was not as sworn. The learned Judge not having the witnesses before him, the same responsibility rests on us that he felt in weighing the evidence. It is true that it was proved that Morrison produced statements of profits to show that he was making large profits, but when produced as a witness he does not support these figures, and there is nothing to show that they had any existence in fact. The comments of the learned Judge upon the list of Morrison's assets convinces me that I am not to arrive at a different opinion on this point of the continuance of the insolvency. I arrive at the conclusion that the concern was never restored to a solvent condition, from Morrison's evidence and the want of all attempt to controvert it with the books in evidence upon which the statement could be corrected. I cannot quite follow the learned Judge below in the manner in which he reaches his conclusion, but this statement from his judgment is pertinent to the view I take:—

“Thus we have invested in real estate and shipping no less than \$73,000. We have here, I think, the explanation of what became of a large part of Morrison's large profits from 1873 to 1883. We find \$70,000 of profits and \$73,000 sunk in more or less improvident investments; such speculations

as a man with a large business depending on the bank for assistance should never have entered into. In all probability enough was sunk in these two classes of investments alone to have covered the whole deficiency that existed when the defendants withdrew their capital at the end of 1872. Are the defendants in any view of the case to be held responsible for Morrison's imprudent investments after they had ceased to have any control of the business? Had he not entered into them; had he displayed the shrewdness he exhibited before he went into the West India business, I have no doubt that he would have weathered the commercial depression which must have ruined many of his customers and which carried down so many cooler headed and more cautious business men than himself. As it is I can have no doubt that Mr. Kenny's estimate of his probable success was fully justified by the event; that he was entitled to the credit he received at the Merchants' Bank, except so far as his speculation in real estate and shipping ought to have diminished his credit."

This suit was commenced in July, 1879. The hearing of evidence was commenced before a master in October of the same year, and it was not concluded till April 1881. There were many pages of evidence and many exhibits and books and papers in manuscript. The case was argued recently before us and we had before us fifty undecided cases of which this was one at the close of the sitting. I have gone carefully over the evidence since the argument. I do not think it necessary, in the view I take, to consider many discrepancies in the evidence, but I think it proper to state that I have arrived at the conclusion above stated without impeaching the veracity of any part of the evidence of Mr. Kenny. Neither was it necessary for me to attempt the task which might have presented itself if I had not been led to put aside much of the evidence as beyond the scope of our enquiry, of reconciling or weighing the contradiction between the evidence of Mr. Gundry and that of the defendant, Mr. T. E. Kenny. Having been led to take the view which I have mentioned of the case, I had come to the conclusion that it would be my duty to decide in favor of the appeal. I was fully sensible that an argument was presented to us that the

plaintiff had no standing in court, that he was not in the eye of the law the assignee ; but there was the statutable certificate in evidence which established his position by making out a *prima facie* case, and I saw nothing,—there was nothing in the evidence before me to counteract the effect of that certificate. It was only since I took my seat on the bench this morning that I discovered that there was the evidence in this case of Mr. Bligh the official assignee. No copy of that evidence had been furnished to me previously and I had only recently learned that such evidence was a part of the case. By that evidence it is clear that the notice required by the statute for the meeting upon which plaintiff's appointment is based was a short notice and not that required by the statute. This question, or one similar, has been several times before us in suits between parties in other than insolvency proceedings, and there is raised quite a debatable point. It was not argued in this case. Following the decisions we have already given I have to decide this point in favor of defendants. Upon that ground, and that ground alone, I concur in the conclusion of my brother McDONALD who has decided for defendants.

SMITH, J., also concurred on the ground that the notice was not sufficient to satisfy the requirements of the statute.

HOGG v. SHEDD.

Before SMITH, WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided April 26th, 1884.)

Equitable defence in ejectment.

PLAINTIFF in ejectment claimed title under a deed from his father. Defendant claimed under an unregistered agreement for a twenty years' lease, prior to the deed, of which he alleged plaintiff had notice. The deed was recorded.

Held, that the defence if good was an equitable defence only and could only be pleaded as such.

This was an action of ejectment to recover possession of a lot of land at Pictou Island in the County of Pictou which the

defendant was alleged to withhold. The defendant pleaded denying the plaintiff's right to the possession of the lot of land claimed. At the trial of the cause, which took place before WEATHERBE, J., at Pictou, October 18th, 1883, it appeared that defendant went into possession of the land and erected a building upon it for lobster canning purposes, under a written agreement entered into with plaintiff's father for a twenty-five years lease, the consideration being the shells and lobster refuse. Plaintiff claimed under a deed from his father of land including the land in dispute made subsequently to the agreement but recorded prior to it. It was contended on the part of the defendant that plaintiff was aware of the lease at the time he obtained his conveyance and the learned Judge left the question to the jury with instructions if they found that the plaintiff had not such notice to give their verdict for him. The jury found a verdict for plaintiff and the cause now came up on a rule to set the verdict aside and for a new trial.

Henry, Q. C., and Borden, in support of the rule.—The verdict of the jury is against evidence in regard to notice. If there was notice the plaintiff cannot recover. There was evidence of a ratification of the lease by receipt of rent reserved which should have been put to the jury. The defendant was at least a tenant from year to year and was in possession under the lease and was entitled to three months notice. As to entry under a void lease see *Woodfall on Landlord and Tenant*, 119. On the question of notice *Ross v. Hunter*, 2 R & G., 44.

McCoy, Q. C., contra.—The document under which defendant claimed was not a lease as there was no rent reserved and there could be no distraint. If defendant's possession was an easement it must be created by deed. If it was a license it was revoked by the deed to the son. The deed was given after the lease but was recorded first. The lease was void as against us even if we had notice; *Registry Act*, Revised Statutes, 4th Series, chapter 79, sec. 26, *Ibid.* sec. 19. Our statute is the same as the New Brunswick statute. There should have been an equitable plea of notice of the lease; 3 *Pugs. & Bur.*, 195.

Borden, in reply.—If the lease was void defendant was a tenant from year to year under the terms of the lease. (THOMPSON, J.—He would be a tenant from year to year as against the father, but if the father conveyed to a stranger the stranger could eject unless you could stop him by showing notice. RIGBY, J.—The Registry Act does not apply to tenancies from year to year.) Plaintiff must show something more than the deed as against the person in possession. The onus is on him to show valuable consideration.

THOMPSON, J., (April 26th, 1884,) delivered the judgment as follows:—

Plaintiff's title depends on a deed from his father. Defendant relies on a previous agreement in writing between the father and himself for a twenty years lease. Plaintiff got priority over this agreement by recording his deed first, and defendant seeks to defeat that priority by showing that the plaintiff, when he received the deed from his father, had notice of the agreement and was therefore bound by it. This is a defence in equity only. No defence on equitable grounds has been put in. Personally, I think, this defence could not be put in to this suit, because the deed against which it would be pleaded does not appear on the record. If it were a legal and not an equitable answer, the fact that there was no opportunity to plead it would be a reason why defendant should have the benefit of it without pleading it. Not so, however, with an equitable answer. We cannot give equitable relief where the equitable defence is not or should not be pleaded. If it cannot be pleaded with propriety the party relying on it must go to the equity side of the court for relief. It is probably sufficient, however, to say in the present case that such a defence has not been pleaded and cannot therefore be made available to set aside the verdict.

The rule *nisi* for a new trial must be discharged.

MCQUARRIE v. THE MUNICIPALITY OF ST. MARY'S.

Before McDONALD, C. J., and WEATHERBE, RIGBY, and THOMPSON, J J.

(Decided April 26th, 1884.)

Liability of Municipal Corporation for negligence.

PLAINTIFF while crossing, on horse-back, a bridge within the municipality received injuries found to have resulted from the negligence of the corporation and its officers.

Held, that the defendant corporation was liable; that the fact of the bridge being on a highway was no defence, or, if a defence, should have been pleaded; and that no notice of action was necessary.

This was an action brought by plaintiff to recover damages for injuries sustained by him by reason of the negligence of defendant in permitting a bridge or sluice on the public highway in the district of St. Mary's, of which defendant was in possession and had the management and control, to become out of repair, whereby, while plaintiff was lawfully and carefully crossing the said bridge or sluice on horseback, and exercising ordinary care and prudence in so doing, his horse went into a hole in said bridge or sluice and stumbled, and the plaintiff was precipitated from his back and fell over, by reason of which fall his, the said plaintiff's, shoulder became dislocated, and he became and was sick and wounded for a long time, and was and is thereby permanently injured and lamed, and has become incapable of resuming his lawful employment, and incurred expense for nursing, surgical appliances and medicine.

The defendants, in addition to a number of pleas in denial, pleaded that plaintiff was aware of the defective condition of the bridge and did not exercise due caution, ordinary care and prudence in crossing it. The cause was tried before WEATHERBE, J., at Guysboro, Oct. 2nd, 1883. The learned Judge instructed the jury that they would presume the municipality liable for the condition of the roads under their supervision and control. In other words, did the damage in this case ensue from the carelessness and neglect of the municipal authorities, or was the road or the sluice in question in a fit and proper condition, so that it might be travelled with ordinary care without danger, or was it left in such a

condition as to have caused the damage to the plaintiff. There was another question for the jury, and that was, did the plaintiff, by his carelessness or negligence, contribute to the casualty which led to the damage complained of and for which redress was sought. If so, the plaintiff, although there was a neglect of duty on the part of the municipality, could not recover. He spoke to the jury on the subject of the application of the law to the facts in evidence, leaving the question entirely open to them. Respecting the measure of damages, he said that for the actual outlay caused by the accident, for medical services and for board and attendance, the plaintiff was entitled to recover. Then he was entitled, if actually prevented for a year from following his usual avocation, to recover; but to allow him the whole of this they must be satisfied that he could and did in no way by his labor reduce the loss. Then to allow anything further they must be satisfied that the injury was of such a character as to prolong his inability to attend to his duties. He thought it would be much more satisfactory if some skilled testimony had been supplied on the subject of the nature of the injury to the arm, and although the absence of such testimony did not preclude the plaintiff from recovering, he did not, he thought, stand in so favorable a light in asking damages for loss of a serious nature.

The jury found a verdict for plaintiff and the cause now came before the court on a rule to set the same aside on the usual grounds.

Pearson in support of rule.—The defendants were not obliged to repair this or any bridge; *Revised Statutes*, chapter 43, sec. 9, sub-sec. 4. The council were not charged with any duty in regard to the care of the bridge. By section 69 of the Municipal Incorporation Act of 1879, the duties of the council extend to roads other than great roads. The onus is on the plaintiff to show that this bridge is under our control. (THOMPSON, J.—It is so *prima facie*; must you not bring yourself within the exception.) That would be requiring us to prove a negative. If the statute did not impose the duty on the council, no action taken by them, or resolution passed by them could charge them. There is a distinction

between corporations that seek to be incorporated and those which are incorporated *nolens volens*; *L. R. 4*, Appeal Cases, 256. This case is on all fours with the case of *Watson v. The Municipality of Colchester*, with some exceptions, and I wish to avail myself of all the points taken there. The municipality has no property in the road—under the Act of Incorporation. There is no inference of negligence to be drawn from the evidence that the Inspector promised to repair the defect. The property in the road was in the Crown; *Revised Statutes*, chap. 43, sec. 8. The amount to be assessed by the municipality is limited, and there would be no obligation if that amount was expended; *Ghent v. Sligo Harbor Commissioners*, *L. J.*, 11 Chan., 190; *39 U. C.*, *Q. B.*, 113. It must be shown that we had the means of performing the duty before we could be charged with it. There was conclusive evidence of contributory negligence. He had previous knowledge of the condition of the bridge.

McCoy, Q. C., contra, was not called on.

THOMPSON, J., (April 26th, 1884,) delivered judgment as follows :—

It seems unnecessary to review the principles which relate to the general liability of municipal corporations for non-repair of highways and bridges after the consideration which was given to them in the recent case of *Walker v. The City of Halifax*, 4 R. & G., 37. This case seems to fall within the rulings laid down in *The Borough of Bathurst v. McPherson*, 4 Appeal Cases, 256, and which we followed in *Walker v. The City of Halifax*. It is true that the defendant corporation here has no special charter, being merely one of the counties and sessional districts which were erected into corporations by the County Incorporation Act of 1879, but the Borough of Bathurst stood in the same position, being made a corporation by a general act to establish municipalities in New South Wales. Under the County Incorporation Act of 1879 the duties and powers of the corporation in relation to the bridges and highways in the district of St. Mary's were fully established in the following particulars which gave the law to the case of the Borough of Bathurst :—

1st. The corporation is capable of being sued, (see sec. 1 and sec. 76 chap. 1 N. S. Acts of 1879,) and this removes what the Judicial Committee, in the case of *Borough of Bathurst v. McPherson*, held to have been the principal objection to the maintenance of the action in *Russell v. The Men of Devon*, 2 T. R., 667, and in some other cases *in pari materia*. See *Borough, &c., v. McPherson*, at page 268.

2nd. The care of the roads and bridges of the district is vested in the corporation and also the power to create a fund for their repair; see sec. 69, sub-secs. i., ii., iii., sec. 80, sec. 84, sub-secs. 34, 38 of chap. 1, 1879, and secs. 1-7, chap. 1 of 1882; see *Borough of Bathurst v. McPherson*, at pp. 261, 262, 266, 267. In view of the enactments just quoted it seems appropriate to cite what was said by the Judicial Committee in reference to *McKinnon v. Penson*, 8 Ex., 327; *Harris v. Baker*, 4 M. & S., 27, and *Parsons v. Vestry of St. Matthew, Bethnal Green*, L. R., 3 C. P., 56, in which it was held that the legislature had merely transferred, to the new authority, existing powers, and did not intend to create a new liability: "Their Lordships think it sufficient to say that this municipality has original and not merely transferred powers, and therefore does not fall within the class of cases referred to." The defendant corporation here has not merely had transferred to it the powers which were possessed by the inhabitants of the district and by the sessions, but the new authority, originating in these statutes, to assess for money to maintain and repair the roads and bridges, to direct the expenditure of the public grants, and to make by-laws "for the preservation of bridges," and "for the establishing of a mode of expending the provincial and other road moneys." The ruling of the Judicial Committee on this point appears to dispose of this case although much prominence was given to the fact that in Bathurst the work which occasioned the injury was a work constructed by the corporate body, while in this case there is no evidence to show whether the work was constructed before or after the incorporation. The liability of the borough was established because of the common law liability resting on the inhabitants, because the care of the work was vested in the corporation, and because the corporation had original and

not merely transferred powers in relation to such case. The case was said (see p. 269) to resemble *Hartnell v. Ryde Commissioners*, 4 B. & S., 361, in which the liability was affirmed on the grounds just enumerated. The decision in the last cited case was said by the Judicial Committee to have "been recognized as sound law in several later cases." So much for the question of the general liability of the defendant corporation. The other points taken at the argument may be disposed of shortly. The question of negligence on the part of the defendant corporation and its officers was left to the jury and found affirmatively on ample evidence to sustain such a finding. The charge of contributory negligence on the plaintiff's part was negatived by a finding also sustained by evidence. The provisions as to notice of action have no application to a case of this kind, and the argument in reference to this bridge being on one of the great roads appears to be of no avail, as it is not shown to be so, and the burden was on the defendant to establish the exception, if exception it could be considered. Besides, the great roads are not exempted from the provisions of the County Incorporation Act generally, but only from those provisions which enable the council to stop up, alter, and divert roads. The objection that the defendant corporation was not shown to have possessed the means to repair the bridge is met to some extent by the evidence, but could not at any rate avail the plaintiff. See the case of *Hartnell v. Ryde Commissioners* above quoted.

The rule should be discharged.

THE QUEEN v. HOLMES AND BRECKEN.

Before McDONALD, C. J., and WEATHERBE, RIGBY and THOMPSON, J. J.

(Decided April 26th, 1884.)

Indictment for keeping dynamite.—Whether carelessness need be alleged.

INDICTMENT charging the defendants with having unlawfully, knowingly and wilfully deposited in a room in a lodging or boarding house, (described), in the City of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the subjects, &c., were in great danger ;

Held good without alleging carelessness, or that the quantities deposited were so great that care would not produce safety.

WEATHERBE, J., dissenting.

The defendants were tried before THOMPSON, J., and a jury at the criminal sittings, and convicted on an indictment charging them with having unlawfully, knowingly and wilfully deposited, or caused to be deposited, in a room of a lodging or boarding house known as the Parker House in the city of Halifax, near to certain streets or thoroughfares, and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, and with keeping the same in such place between certain specified dates in large, excessive and dangerous quantity, by reason whereof "the subjects of our Lady the Queen during the time, aforesaid, passing along and through said streets and highways" and residing "near to the said lodging house and premises were in great danger and peril of their lives and property."

The case came before the court on a case reserved by the learned Judge.

The *Attorney-General* and *Weeks* appeared for the Crown and *Mutton* and *Lyons* for the prisoners.

THOMPSON, J., (April 26th, 1884,) delivered judgment as follows :—

I had no doubt whatever at the trial as to the two points on which this case depended as regards the merits, viz : that it was an indictable offence to keep dynamite, or any other explosive, under such circumstances as to cause general

danger to life or property—whether these circumstance arose from the quantity kept, or the want of due precaution in the keeping; and that the defendants had committed the offence. On these points I have no doubt now and I understand that the court is unanimous. The only point concerning which I had a doubt was whether the indictment was sufficient, inasmuch as it appeared to charge merely the depositing and keeping of the dynamite, and not the depositing or keeping under such circumstances as to cause general danger to life and property. The causing of danger is the gist of the offence and the question is whether the law will infer that from a statement that the explosive was deposited in or near a public place, or whether, besides such proximity, it must be alleged that carelessness existed, or that the quantity was so great that care would not produce safety. The question appeared to me to be one of great importance because explosives are articles of commerce, and the business of dealing in them and using them is growing yearly as the mining industries increase and public and private improvement extends. If the mere keeping of such explosives near habitations and places of public resort is indictable, it was conceded by counsel for the Crown that many who sell, buy, and use such commodities make themselves liable to the penalties of the common law who suppose that they are merely pursuing a lawful business in a lawful way, and therefore it was better, in my opinion, in the interest of the public as well as of the prisoners, that the law on the subject should be declared by the highest court of the Province than that it should appear to be the declaration of a single Judge. In addition to these considerations I had before me the case of *The People v. Sands*, 1 Johnson's Reports, 78, in which the New York Supreme Court and Court of Errors decided, with but one dissenting voice, that the keeping of fifty barrels of gunpowder in a house in the city of Brooklyn, and the carting of gunpowder to that house, through the streets, in waggon with iron-tired wheels, were not offences against the common law, unless something was alleged and shown besides all this to establish carelessness,—decided in effect that the keeping and handling of such an explosive was not an offence, any more than the keeping and

handling of any other article of commerce, but only the careless keeping and handling of it—which in the indictment against Holmes and Brecken was not charged. The decision of a court in the United States of so high a standing and presided over by so eminent a jurist as Chancellor KENT, who concurred in the decision and supported it by what appears to me as very cogent reasoning, could not but have great weight. As Chief Justice COCKBURN said, in *Scaramanga v. Stamp*, 5 C. P. D., 303, “although the decisions of the American courts are of course not binding on us yet the sound and enlightened views of American lawyers in the administration and development of the law,—a law, except so far as altered by statutory enactment, derived from a common source with our own,—entitle their decisions to the utmost respect and confidence on our part.” This was practically exemplified four years ago when the Attorney-General of England, eight years after Castro, (the “Tichborne claimant,”) had commenced to undergo his two consecutive terms of seven years imprisonment each, granted his fiat for a writ of error to have the legality of the sentence reviewed because a New York court had decided, in the case of the celebrated Tweed, that consecutive sentences could not be imposed. The research which I have been able to give to the question has convinced me that the decision in the New York case of *People v. Sands* is not according to the common law of England, and that the mere keeping of explosives near habitations or places of public resort in such quantity that injury to property or life would be caused if they were to explode is a common nuisance and indictable, irrespective of such incidents as carelessness and negligence. The earlier cases for such a proposition seem to be *Rex v. Williams*, 1 Russ. on Crimes, 298, note o: “An indictment against Roger Williams for keeping 400 bbls. of gunpowder near the town of Bradford and he was convicted.” *Rex v. T aylor*, 2 Strange, 1167: “The court granted an information against the defendant as for a nuisance on affidavits of his keeping great quantities of gunpowder near Maldon in Surrey, to the endangering of the houses and church where he lived.” In *Williams v. The East India Company*, 3 East, 200, Lord ELLENBOROUGH said: “That the declara-

tion, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to make the putting on board wrongful, the defendants must be conscious of the dangerous quality of the article put on board; and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable and punishable as for a misdemeanor at least." *Rex v. Burnet*, 4 M. & S., 272, and *Rex v. Vantandillo*, *Ib.*, 73, in which it was held indictable to carry through the street a child infected with small-pox, although it was being so carried for treatment and without any accusation of negligence. In *Regina v. Lister*, 1 D. & B., 209, most of these cases were cited and reviewed, and although it does not seem to me that the case reserved called for the decision of such a point as that before us, turning as it did rather on the proof than on the form of the indictment, and the indictment not being so bald as the one here. yet the opinions of several of the Judges were given on the present question, and we cannot but regard those opinions as weighty evidence of what the common law doctrine on the subject is, and as to the value which is to be attached to these early decisions, most of which are very meagrely reported and none of which appear to have been as well reasoned and considered as the New York case. In this case of *Lister*, Lord CAMPBELL said, in reply to a suggestion by Sergt. Parry that *Rex v. Taylor* was the only authority that the mere keeping of gunpowder is indictable, and that perhaps in that case the keeping was in such a manner as to cause danger: "It would surely be indictable to keep twenty tons of gunpowder in Cheapside." In the course of his judgment he says: "To manufacture or to keep in large quantities in towns or closely inhabited places, gunpowder * * * is by the common law of England a nuisance and indictable offence," and he cites, among other authorities, *Rex v. Taylor* and *Rex v.*

Williams. Farther on he says: "With great and unintermitting care gunpowder might be kept, and perhaps manufactured, in very large quantities without doing any damage, but the law takes notice that occasional carelessness may be reckoned upon and forbids that to be done which, on the recurrence of carelessness, will in all probability prove destructive to life and property. Therefore the simple keeping of large quantities of gunpowder in the midst of a dense population was considered to be a misdemeanor at common law." Finally, as opposed to the New York case, we have *Cheatham v. Shearer*, 1 Swan, Tenn., 213, in which the Supreme Court of Tennessee held that a powder magazine, in which large quantities of gunpowder are stored, when erected in a populous part of a city, is *per se* a nuisance. (This was just the state of facts in the New York case.) See 2 *Bishop*, on C. L., sec. 854. And in *Wier's Appeal*, 74 Penn. R., 230, the Supreme Court of Pennsylvania held that the erection of a powder house may be restrained without the existence of actual irreparable damage, but to prevent it. I need hardly say that in principle the keeping of dynamite cannot be distinguished from the keeping of gunpowder or any other explosive. No question of that kind arises under the indictment, and the evidence was such as to make it clear that, while the compound has characteristics which render it unlikely to explode under some of the conditions which will explode gunpowder, it has other tendencies to explode which gunpowder is not so susceptible; to but apart from the question of susceptibility, the fact that the article is an explosive, and one of very great power, the quantity in the Parker House being equal in force to five barrels of gunpowder, was sufficient to call for the verdict which was rendered. The doctrine of the common law on this subject will be found ample enough to reach not merely cases like those of the present defendants but the other cases which were mentioned at the trial and argument, the cases of those persons who in the pursuit of their business recklessly keep, store or handle explosives which are dangerous to life and property.

The conviction should therefore be affirmed and judgment proceeded with.

MCDONALD, C. J.—I concur for the reasons stated.

WEATHERBE, J.—No doubt we could not follow the case, *People v. Sands*, in Johnson's Reports if it was not as it professes to be in accordance with the common law, but I am of opinion it was based on the English law. It seems to be admitted that this case cannot be decided against the accused except upon the proposition that the keeping of explosives near places of public resort in quantities so large as to cause danger in case of explosion is an indictable offence. I think that depends upon the degree of the explosive quality of the substance or whether, in other words, it is dangerous to life or property to so keep it. And I cannot see that the case of common lighting gas may not afford an illustration. It is an explosive substance, but with care it may safely be introduced, as it is, everywhere. The careless keeping of it would constitute an offence, punishable, I have no doubt. And I have no doubt that dynamite from the nature of the substance is dangerous even where introduced with great care, but I cannot understand that, to constitute the offence of keeping it, its dangerous character should not be described or shown from the manner of keeping it. I do not think it would be an offence to keep a large quantity of an explosive substance in a wareroom or near a place of public resort where there was no danger from temperature or concussion, but only by the application of some element not possible to be applied to the explosive. And I think it is not contended that there is any authority to the contrary. The keeping of dynamite or gunpowder or any thing of an explosive nature may be made an offence by adding the proper word, but without that word, I think, no conviction can be good. *Hawk.*, book 1, chap. 76, § 88, cited in *2 Arch. Crim. Pl.*, 7th Am. Ed., 990, shows that "the manner in which the powder is kept may or may not constitute a nuisance according to circumstances, which circumstances must be explicitly stated in the indictment so that the defendants may be prepared to meet them, and so that the court may judge of their force." If this be so of the ancient explosive material,—gunpowder,—I think *a fortiori* that it applies to the modern explosive,—dynamite. I am quite satisfied the evidence reported in the case reserved clearly

shows the offence and would justify the conviction, and little proof would be needed to constitute a more serious crime, but we are dealing with a strictly technical question of pleading. In *Williams v. East India Co.*, 3 East., 192, it was said by the court that "in order to make the putting on board wrongful the defendants must be conscious of the dangerous quality of the article put on board; and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounted to a species of delinquency in the persons concerned in so putting such dangerous article on board for which they were criminally liable and punishable as for a misdemeanor at least." This was a civil action for damages in which the carelessness was fully set out in the declaration. I cannot see that there is a sufficient statement of the offence as proved set out in the indictment before us.

BURKNER v. WALLACE.

Before McDONALD, C. J., and SMITH, JAMES, RIGBY and THOMPSON, J. J.

(Decided April 26th, 1884.)

Interpretation of expression, "Matters of Practice," in R. S., cap. 95, of procedure in Equity.

THE expression "matters of practice" used in sec. 78 of cap. 95, R. S., 4th series, of Procedure in Equity, as not being subject to appeal, refers only to those matters of mere procedure in which the Judge has a discretion but not involving any legal principle.

The decision of the Judge in Equity on the following point was held not subject to appeal:—

That the answer to the plaintiff's bill professed to be the personal answer of the defendant but was not signed by him.

The following grounds of appeal were disallowed as involving mere matters of practice:—

1. That no exceptions can be taken to an answer in the Equity Court of Nova Scotia, but all objections must be taken by demurrer.
2. That none of the exceptions to defendant's answer were taken in time.
3. That the exceptions were not set down for argument in the time allowed, and could not be so set down afterwards without an order.
4. That the parts of the bill alleged to be insufficiently answered were not set forth in the exceptions nor referred to with certainty.

Ground of appeal, that the judgment is contrary to law and equity, *held too general.*

Held, that defendant, having undertaken to make an account part of his answer, could not be heard to say that the bill did not ask for it.

Where plaintiff took thirty-one exceptions to defendant's answer, on four of which defendant succeeded on appeal, plaintiff was ordered to pay four thirty-firsts of defendant's costs of appeal and defendant twenty-seven thirty-firsts of plaintiffs; the costs to be set off.*

* Several of the rulings of the Court, depending upon the particular allegations in the bill and answer, are omitted in the above head-note, for the reason suggested in the reporter's statement of the case.

Plaintiff, being about to leave the Province, made a conveyance of his real and personal property to the defendant on certain trusts. Subsequently plaintiff brought a suit in equity for an account. Defendant filed his answer to which plaintiff took a number of exceptions, and the cause now came before the court on appeal from the decision of the learned Judge in Equity sustaining some of the plaintiff's exceptions. The bill and answer and the exceptions thereto, with the decision of the learned Judge in Equity thereon are too voluminous to be printed in full, and the judgment of the Court, *per* RIGBY, J., sufficiently states so much of the case as is considered likely to be valuable as a precedent.

Wallace in support of appeal.—The plaintiff should have set out the portions of the answer to which he took exception. Exceptions cannot be taken to an answer in equity but should be taken by demurrer. If exceptions can be taken they must be taken within thirty days as in the case of a replication. In England if exceptions are not taken within six weeks the answer is deemed sufficient. If the exceptions are not taken in time leave must be obtained from the Judge. The bill did not require the defendant to set forth an account. The judgment purports to decide more exceptions than were taken. There is no allegation in the bill that the plaintiff was possessed of personal property. The defendant need answer nothing that is not distinctly set out in the bill, or that is immaterial. If the plaintiff wishes to set aside the sales made by the defendant the persons to whom the sales were made should be made parties. Before the plaintiff can have any complaint he should tender the amount due the defendant and ask for a reconveyance. In England the answer is signed in the same way as if it were an affidavit. The answer need only be to matters sufficiently set out in the bill; *6 Ves.*, 458; *2 Beav.*, 58; *Story's Eq. Plead.*, 876; *Daniell's Ch. Prac.*, 759. As to how the case should be set forth in the bill see *2 Hare*, 264; *Daniell's Ch. Prac.*, 727. There is nothing to show specifically what part of the answer the plaintiff excepts to. There must be a clear charge; *Daniell's*

Ch. Prac., 760. The exception must be material; *Daniell's Ch. Prac.*, 717. Where an exception is taken for impertinence part of it cannot be allowed. It is not necessary to set out the accounts in full in the answer; *L. R.*, 4 Ch. App., 336. Where the defendant makes an admission which entitles the plaintiff to an account the case is sent to a Master. The only remedy of the plaintiff was to redeem; *Daniell's Ch. Prac.*, 283; 3 *Beav.*, 355; *Story's Eq. Plead.*, 85; 1 *DeG., M. & G.*, 393.

Ritchie, Q. C., and *Gray*, contra.—The defendant is bound to answer or deny every allegation in the bill though not specially interrogated; *Revised Statutes*, chap. 93, secs. 8 and 9. All the objections are in effect matters of practice as their purpose is to compel the defendant to amend his answer. If the Judge of the Equity Court decides a point of practice there is no appeal whether the decision is right or wrong. The answer put in by the defendant is in effect a cross bill and sets up matters not asked for. If defendant got any of the goods mentioned in the assignment we are entitled to a statement of them. Even supposing the mortgage in the property to have been taken with the plaintiff's assent the purchase by the defendant did not affect the trust. If the sale was *bona fide* we are entitled to know what was received by the defendant. It is not denied that defendant cut trees and took gold from the property. The defendant should give reasons for charging the plaintiff with the amounts charged in his account and should give the items of his charges. He should explain the charges and show authority for charging the plaintiff. It should be shown, for instance, that the property was of such a nature that the defendant required to go to England to sell it. If the 36th exception is sustained it goes to the whole answer. It has been sustained by the Judge below and, being on a matter of practice, there is no appeal. The answer professes to be by the defendant in person but is signed by his attorney. The affidavit annexed is defective in the jurat and is wrongly headed. A proper affidavit was subsequently filed.

Wallace replied.

RIGBY, J., (April 26th, 1884,) delivered judgment as follows:—

This is an appeal from the decision of the learned Equity Judge upon certain exceptions taken by plaintiff to defendant's answer. Plaintiff's counsel contended before us that inasmuch as "matters of practice or of costs" are excepted from the cases in which an appeal is allowed from the decision of the Judge in Equity, the present appeal would not lie. I think, however, that the expression "matters of practice" in sec. 73, of chap. 95 of the Revised Statutes is only intended to refer to those matters of mere procedure in which the Judge has a discretion, but not involving any legal principle. If the words were given as wide a meaning as they would probably bear, and as was contended for, the cases in which an appeal would lie would be virtually limited to the final decision in the cause, while interlocutory rulings determining important points, upon which the whole litigation might turn, would be final. The language of the section seems opposed to such a conclusion for it provides for an appeal from "every decision, order, judgment and decree," with the exceptions already adverted to. Notwithstanding the rule that there was no appeal as to costs an appeal was allowed upon a question of costs in the case of the *Rio Grande Do Sul Steamship Co.*, 5 Ch. Div., 282, Lord Justice JAMES saying that, though the decision related to costs, it involved "a question of law and principle" and was subject to appeal. And in *Yeo v. Tatem*, 3 L. R., P. C., 696, Sir Joseph NAPIER, at p. 702, said: "Their lordships do not mean to question or recede from the decisions that have been pronounced regarding not allowing an appeal for costs, but where there has been a mistake upon some matter of law that governs or affects costs,—some matter that involves the due application of a principle of law,—the party prejudiced is entitled to have the benefit of the correction by appeal." The thirty-sixth exception, that the answer professed to be the personal answer of the defendant but was not signed by him, was upheld by the Equity Judge, and being a mere matter of procedure, was not in my opinion appealable. Plaintiff's counsel contended that, as the ruling on this exception went to the whole answer, it disposed of the

appeal if decided in his favor. But as the defendant has a right to the judgment of the court on each of the exceptions, it will be necessary to dispose of all to which this appeal relates; *Rowe v. Gudgeon*, 1 V. & B., 331; *Agar v. Gurney*, 2 Mad., 389. Besides specific objections to the judgment, upon each exception, the defendant has stated the following general grounds of appeal :—

1st. As to all the exceptions and any part or parts of exceptions allowed ;—because no exceptions can be taken to an answer in the Equity Court of Nova Scotia, but all objections must be taken by demurrer as provided under chapter 65, section 10 of the Revised Statutes.

2nd. Because none of said exceptions were taken within the time allowed for that purpose.

3rd. Because said exceptions were not set down for argument within the time allowed for that purpose, and they could not be set down afterwards without an order of the court or of the Judge, which was not obtained.

4th. Because the parts of the bill said to be insufficiently answered, were not set forth in the exceptions, nor referred to with any certainty, nor were the parts of the answer pretended to be insufficient so set forth, or referred to with any certainty as the law and practice require.

5th. Because the defendant was not required by the bill to set forth an account.

6th. Because the judgement purports to decide thirty-six exceptions, whereas there were only twenty taken, and one said to be disallowed, and several of those said to be allowed had no existence, and the order taken follows the judgment in this respect, which order was taken without its having been submitted to the defendant or his attorney, and without the assent of either of them, and the said judgment and order taken thereupon are defective, irregular and erroneous.

7th. Because the judgment and order granted thereon, so far as it is adverse to the defendant, is contrary to law and equity.

* * * * *

10th. Because as the bill is bad on its face and no judgment can be given thereupon for the plaintiff, no answer could be enforced or excepted to for insufficiency or otherwise.

The 8th and 9th grounds were abandoned at the hearing.

The first ground of appeal is based upon mere matter of form and is not appealable, the objections to the answer are stated as exceptions, but could, without impropriety, be styled demurrers. Besides I am not prepared to say that because our statute provides that either party may demur to the pleading of the other, the practice of filing exceptions to an insufficient answer was thereby intended to be abolished. The second, third and fourth of the above grounds raise points of mere procedure involving no legal question, and if they were appealable the material is not before us to enable us to determine the second and third. As to the fifth ground the prayer of the bill asks that an account should be taken, and the defendant, having undertaken to make such account a part of his answer, which the prayer for general relief would justify him in doing, cannot now be heard to say that the bill does not ask for it. The sixth ground was disposed of at the argument and requires no further reference. The seventh ground is too general. The tenth ground is properly disposed of by that part of the decision appealed from, which sets forth that the defendant having previously taken advantage of the alleged defects in the bill by demurrer, which has been overruled, cannot now raise them as against these exceptions. We will turn now to the exceptions in detail, the first of which is as follows:—For that the said defendant hath not, to the best of his knowledge and belief, answered and set forth a full, just, true and complete inventory and account of all and singular the lands, goods, and chattels, personal estate and effects whatsoever which the plaintiff was possessed of, entitled to, or interested in at the time of the date of this indenture or assignment in trust in said writ or bill herein mentioned, or at any time afterwards, which came into the hands or possession of the defendant, and all the particulars whereof the same consisted and the quantities,

qualities, full, real and true value thereof, and of every such particular as in the prayer of the said writ is asked for. I am of opinion that the defendant should not have been required to give the value of the personalty, because it is not asked for in the bill and I do not see how it is material, although it is important that the plaintiff should know of what it consists. Otherwise I think the judgment on this exception should be sustained. The defendant is entirely in error when he says that there is no allegation in the bill that the plaintiff was possessed of or entitled to any personalty, and in the second paragraph of his answer defendant admits that the plaintiff, when he made the assignment, was the owner of personal property covered by such assignment. The following is the second exception: "Also, for that the defendant hath not answered and set forth to the best of his knowledge and belief the price or prices at and for which he sold, or professed to sell, certain properties in the said trust deed or assignment mentioned, or conveyed unto his son Thomas A. Wallace, and which the said Thomas A. Wallace sold, or professed to sell, to one Thomas K. Jenkins, as stated in the ninth clause of the plaintiff's writ herein, if as the defendant claims that the said sales were *bona fide* and for valuable consideration and as required in the prayer of the said writ herein." I agree with the learned Judge below that the statements in the answer in relation to the assignment of the trust property by the defendant to his son are entirely unsatisfactory, and that this exception should be sustained. The plaintiff only asks that the price or prices at which defendant sold to his son should be stated. Plaintiff charged that the sale was a fraudulent one, but defendant denies this and should therefore have disclosed the particulars of the transaction so that plaintiff might have any advantage from the transfer that the facts would warrant, and not be put off with the statement that the plaintiff had no right to question the conveyance. The plaintiff's right to this information is not affected by the fact that he does not by his bill seek either to redeem the mortgage or to set aside the sale. Considering the fiduciary position in which defendant admittedly stood, the plaintiff was entitled to the benefits, if any, resulting from the purchase

made by defendant, and to a disclosure of all the facts connected with defendant's management and disposition of the property. The particulars referred to in the third exception should be furnished as required by the Judge. In the sixth paragraph of the bill it is alleged that the defendant used and occupied the property at West Waverly for his own use and benefit, lived on it, and dealt with it as if it was exclusively his own; and in the prayer defendant is required to file an inventory of the timber cut or sold from the real estate. If no timber was so cut or sold defendant should have so alleged. So also I think the burden was upon him to show that the quartz taken from the property was from the interest of the one-third owner and not out of plaintiff's share. It is not a sufficient answer merely to say that the mine was worked at a loss; the plaintiff was still entitled to contend otherwise, and for such purpose to be informed of all the facts. The decision upon the fourth exception should also be sustained. The plaintiff is only liable for the amount of his actual indebtedness to defendant without reference to the sum stated in the assignment as the amount of defendant's preference, especially as the bill states and the answer admits that the latter amount depended upon liabilities of plaintiff which defendant was to pay subsequently. The plaintiff was entitled to more specific information as to the \$203 charged in defendant's account, and also as to the \$500 charged for expenses to England, and the decision upon the fifth and ninth exceptions should therefore be upheld. I think that the charge in the account of \$68 "costs versus Ellershausen" in connection with the allegations in that clause of the answer at the foot of p. 53 of the printed case, gave plaintiff sufficient information in relation to this charge and that the 10th exception should have been overruled. I concur in the ruling of the learned Judge in reference to the exceptions from eleven to twenty-nine inclusive. It is true that there is no allegation in the bill that defendant received any rent from the trust property, nor that any coal stocks were sold by defendant, but as defendant in his answer alleges that he leased the forty-five areas to O'Toole & Cribby, and in his account credits plaintiff with the proceeds of the sale of

the coal stock, I think he should have stated the amount of rent, if any, which he received and also the particulars of the sales of the coal stock, and that the thirtieth and thirty-first exceptions were properly sustained. I can find no allegation or admission of the sale by defendant of any water power; the defendant's account however credits cash from sale of land, and the particulars of any such sale should have been given as required by the thirty-second exception. The particulars relating to interest referred to in the thirty-third exception should be furnished. I do not think that the thirty-fourth exception should have been allowed because the parts of the answer to which it refers are not sufficiently identified. I quite agree that the answer is very largely impertinent, but neither the exception nor judgment designates what parts of it are open to this imputation, and it would be impossible for the defendant to know what portions of his answer should be eliminated in pursuance of the judgment. The letters are specified as some of the impertinent matter, but it is established that an exception for impertinence must be sustained *in toto* or not at all; *Teuch v. Cheese*, 1 Beav., 474. I agree that the thirty-fifth exception should be sustained. The grounds of appeal are covered by my remarks in relation to previous exceptions and particularly as to the third.

On this appeal the court had to consider thirty-one exceptions in relation to four of which defendant succeeded. Plaintiff should therefore pay four thirty-firsts of defendant's costs of appeal and defendant twenty-seven thirty-firsts of plaintiff's; defendant's costs to be set off against those payable to plaintiff.

CROWELL ET AL. v. JONES.

Before McDONALD, C. J., and McDONALD, SMITH, WEATHERBE, and RIGBY, J. J.

(Decided April 26th, 1884.)

Joint or several contract.—Barratry of the master, being part-owner.

THE case stated for the opinion of the court set out that the schooner *Khedive* was insured by E. H., for and on account of N. S. C., who owned eight shares; D. S., who owned four shares; H. S., who owned four shares, &c., and also on behalf of Nathaniel Snow and Jeremiah Snow; that while said policy was in force the vessel became a total loss by the barratry of Nathaniel and Jeremiah Snow who were respectively the master and one of the crew, and were part-owners of the vessel. The policy was "on behalf of whom it may concern" and insured the sum *in solido* on an entire ship for one premium.

Held, that the contract of insurance was several and that the innocent owners could recover notwithstanding the barratry of the other owners.

WEATHERBE, J., *dubitante*. RIGBY, J., *dissentit*.

The opinion of the court was desired on the following state of facts:—

The schooner *Khedive* was insured by Levi Hart for and on account of Nathaniel S. Crowell, who owned eight shares; David Smith, who owned four shares; Howe Snow, who owned four shares; Harvey D. Smith, who owned four shares; Joseph Smith, who owned four shares; Howe Swaine, who owned four shares; Hezekiah Huskins, who owned four shares; John Coffin, who owned four shares, and George A. Crowell, who owned four shares in the above vessel, and who were the plaintiffs; and also on behalf of Nathaniel Snow and Jeremiah Snow, in the sum of one thousand dollars, with the defendants, the policy for which was annexed, and the cargo on board of said schooner, on behalf of and for the plaintiffs, and the said Nathaniel Snow and Jeremiah Snow, in the sum of one thousand dollars, the policy for which was also annexed, with the defendants; that while said policies were in force the said vessel and cargo became a total loss.

It was admitted that at the time of the loss of said vessel and cargo one of the owners, the said Nathaniel Snow, who owned eight shares of said vessel, was master of her, and another owner, the said Jeremiah Snow, who owned sixteen shares, was one of her crew, and that the said master wilfully cast her away and caused said total loss of said vessel and cargo.

The cargo consisted of fish, belonging to the owners of the vessel, caught on a previous voyage, and was being brought up to Halifax from Port la Tour by the master, at the request of the other owners, to be handed over by him to Mr. Hart, who had supplied the outfits, in payment of his accounts, and was the goods covered by the last mentioned policy.

The questions for the consideration of the court were:—

1st. Whether the barratry of the master—he being part owner—would prevent the other owners, or either of them, from recovering their insurance on the vessel and cargo, under said policies to the extent of their interests.

2nd. If the court should be of opinion that the plaintiffs or either of them were entitled to recover, then judgment to be entered for the amount of their respective interest in the said insurance on said vessel and cargo against the defendants with costs.

3rd. In case of any dispute as to the quantity or value of goods on board said vessel at the time of the loss, or the interest of the plaintiffs therein, then that question, as well as the amounts of insurance the owners or either of them were entitled to on said goods to be settled by reference to a Master, after hearing the evidence, subject to the opinion of the court if either desired, and judgment to be entered therefor, together with the amount of insurance on said vessel, to which said owners, or either of them, were entitled, with costs, against the said defendants.

4th. In case the court should be of opinion that none of the said plaintiffs were entitled to recover their interest in said insurance on said vessel and cargo, under said policies, or either of them, then judgment to be entered for the defendants against the plaintiffs.

The cause was argued in the first instance before a division court consisting of McDONALD, C. J., and JAMES and RIGBY, J J., who delivered judgment (April 9th, 1883.) as follows:—

RIGBY, J.—This was a case submitted to this court by consent of parties to determine the liability of defendant as one of several underwriters upon two policies of insurance dated the 27th day of November, 1880, one upon the schooner

Khedive, for one month, and the other upon property laden on board of her. It was admitted that the vessel and cargo were owned by the plaintiffs and Jeremiah Snow and Nathaniel Snow; the vessel by them as part owners, in certain specified shares, and that said Nathaniel Snow, being her master, wilfully cast her away and caused a total loss of said vessel and cargo during the continuance of the policies. In each policy Levi Hart was named as the assured "on account of whom it may concern," and it was admitted that the insurance was made by him for and on account of the said owners. The risks covered by each policy included "barratry of the master," limited in the policy upon the vessel by the qualification "unless the assured be master of the vessel," and in that on the cargo "unless in case of loss on goods or specie when the master is the consignee or supercargo thereof." It was contended by the plaintiffs that the policy on the vessel, to which I shall first direct my attention, was a several contract of insurance with each part-owner for his proportionate share of the whole insurance, and that as against all the owners, but the master, the wilful casting away of the vessel by the latter was an act of barratry coming within the perils insured against and for which these owners, not concerned in the act, were each entitled to recover their interest in the sum insured. It will hardly be disputed that if instead of being a several contract with each owner the policy in question was a joint contract with them all, that the plaintiffs could not succeed. In such a case the master would have to be a party to the suit and obviously could not recover for a loss occasioned by his own wilful destruction of the subject insured. Indeed this was not denied at the argument. Whether the contract was joint or several, the present plaintiff could not recover, but defendant's counsel at the argument, when this was suggested, refused to raise that question and requested us not to decide the case upon that ground. In seeking for the intention of the parties as disclosed in the language used by them in the contract which I am now considering, I would be inclined, without reference to any special rules of construction, to conclude that a policy such as this, made by an agent for

unnamed principals, insuring a sum *in solido* upon an entire ship, for one premium, could not, in the absence of express words declaring a contrary intention, be otherwise than a joint contract. The same agreement as the one before us, if the owners had insured without the intervention of an agent, would have been thus expressed: "Nathaniel S. Crowell, David Smith, Howe Snow, Harvey D. Smith, Joseph Smith, Howe Swaine, Hezekiah Huskins, John Coffin, George A. Crowell, Nathaniel Snow, and Jeremiah Snow do make insurance, and cause themselves to be insured, lost or not lost, the sum of \$1000 on the hull, &c., of the schooner *Khedive*, &c.," and so I think we may now read this policy, the principals being admitted and the proceedings being in the names of some of them; and all the authorities concur that the law raises the general presumption that the right created in the insured by such a contract would be a joint right in the absence of words showing a contrary intention. Parsons in his work on Contracts says at p. 11 of the 4th edition:—"Wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand there should be words of severance in order to produce a several responsibility or a several right." And at page 13:—"As a contract with several persons for the payment to them of a sum of money is a joint contract with all, and all the payees have therein a joint interest so that no one can sue alone for his proportion, so the designating of the share of each will not create such a severance of interest as to sustain a several action, but all must join in an action for the whole. But if the contract contains distinct grants or promises of distinct sums to distinct payees they would then have several interests, and certainly may, perhaps must, bring separate actions." See also *Wetherell v. Langton*, 1 Exch., 634; *Hatsell v. Griffith*, 2 C. & M., 679. In *Phillips on Insurance*, section 1958, it is laid down that "in a policy not under seal effected by A, for whom it may concern, *assumpsit* lies in the name of A for the benefit of those concerned, or in the names of all the concerned. In an action by the 'concerned' all of them

must be joined unless it appears by the contract itself that the promise by the underwriter is to them separately or severally. The assumption is of a joint interest and right of action in all the assured ;" and in section 1960 ; " Where two persons are insured in the same policy on distinct interests, distinctly specified in the same subject, each has a separate action on the policy. * * * If the contract in favor of two or more does not show their interest to be distinct and provide for a liability of the obligor to them separately or severally they must all join in an action," and in section 1972 the same learned author says : It cannot be supposed that " actions can be brought by the assured separately in case of a policy upon the aggregate of the respective proportions of the divers assured in the same insurable interest and subject. To permit this would be to split the right of action." I can find nothing at variance with what is thus laid down unless what is said by Mr. Parsons at p. 48 of his work on Marine Insurance may be so considered,—where he states that " where the expression 'all whom it may concern' or the like, covers many persons, whose interests are not strictly joined, as partners, but several, as part-owners or tenants in common, each may sue as on an independent policy made by him unless the policy itself shows a joint contract." For this conclusion the learned author gives no authority ; but unless we are to assume that he refers to cases in which the policies contain language from which a contract with each separate party insured could be inferred—and which we have not here—I do not see how this statement of the law can be reconciled with what I have already quoted from his own work on contracts. It was, however, urged upon us at the argument, that there was a qualification to the general rule to which I have referred, in determining whether a contract was joint or several, and that as regards covenantees and persons with whom contracts were made, the contract was to be taken to be joint or several, according to the interest of the parties to it, and that, as in the case at bar the part owners of the *Khedive* had a several interest in their respective shares, we must construe the policy in question to be a several contract with each of them ; and there is no doubt that if the language of the contract is

capable of being so construed this principle of construction must prevail; see note (q) to page 14 of Parsons on Contracts, 4th edition; *Sheppard's Touchstone*, p. 166; *Bradburne v. Botsfield*, 14 M. & W., 572. But admitting the principle to go as far as some of the cases might seem to indicate and that even as against express words the interest of the parties is to conclude the question in all cases, surely it must be conceded that in a written contract this interest must be gathered only from the language of the contract itself. There can be no such difference between this and any other contract as to permit parol evidence to be introduced for the purpose of adding to or otherwise varying it, and I undertake to say that no case can be found in which the interest of persons who have contracted in writing has not appeared upon the face of the contract, in which such interest has been established *dehors* the document for the purpose of determining whether the contract was joint or several. How can it be said that there was any mutuality in the present case between the insurer and insured to create a several undertaking by the former with each part owner? To enable us to say so we must introduce such additional language into the writing as will indicate that the insurance was made for several persons, each having a distinct and separate interest in the subject insured, and the *quantum* of the interest of each,—facts which may have been entirely unknown to the underwriter when the contract was entered into; and whereas upon the face of the contract which he had executed he had become liable to one action to recover one amount in case of loss, the facts in question would so change the contract as to render him liable to an action by each part owner for his separate proportion of the whole insurance. Of course for the purpose only of showing who were the principals to the contract and that they had an insurable interest, and not in any way to change the terms or character of the contract, evidence might be given on the trial of any action under this policy to show who were the owners, if these issues were raised, but not necessarily that they were part owners or in what proportions, and if such evidence were introduced it could not be used for the purpose of establishing the contract to be a several one, any more than

it could be to alter its terms in any other particular. As I can find in neither of these policies any words of severance and nothing to indicate the nature of the interest of the parties for whose benefit the insurances were made, I have arrived at the conclusion that the several underwriters on each policy thereby contracted with the owners jointly, and that no action can be successfully maintained on either without making Nathaniel Snow a plaintiff, and for these reasons I am of opinion that any of the other owners are prevented from recovering any part of the sum insured on vessel or cargo and that judgment should be for defendant with costs.

JAMES, J., concurred, but doubted whether the contract was not a several one.

MCDONALD, C. J.—The question now under judgment came before the court on a special case agreed to by the parties concerned, and the facts are substantially stated in the judgment of my brother RIGBY which he has kindly permitted me to read. I agree with the conclusions which my learned brother has reached as to the policy on the cargo referred to in the special case, but I do not think the argument applicable to that policy should prevail as against the claim of the insured in the policy on the vessel. I admit of course that the master, Nathaniel Snow, cannot recover, and the question therefore is, substantially, whether the contract of assurance, made under the circumstances set forth in the case, is a joint contract in which all the assured must join, or a several contract under which each part owner insured can recover his individual interest as shown. The interest of each of the assured is set out in the case and we are not therefore embarrassed by any inquiry of that character. I need not recapitulate the observations made by Mr. Justice RIGBY as to the general principles by which joint and several contracts are distinguished, or the rules which govern this court in the construction of contracts and deeds generally. A policy of insurance must, like all written instruments, be construed "according to its sense and meaning as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain ordinary popular sense,

unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the contract evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense. The only difference between policies of assurance and other instruments in this respect is, that the greater part of the language of them being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing, (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater affect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects;" *Robertson v. French*, 4 East., 134. "The contract of assurance, though a mercantile instrument, is to be construed according to the same rules as all other written contracts, viz., the intention of the parties, which is to be gathered from the words of the instrument interpreted together with the surrounding circumstances. If the words in the instrument are clear in themselves the instrument must be construed accordingly, but if they are susceptible of more meanings than one, then the Judge must inform himself by the aid of the jury and the surrounding circumstances which bear on the contract;" ERLE, C. J., in *Carr v. Montifiore*, 5 B. & S. 427. In *2 Parsons on Contracts* the rule is thus stated:—"There are many words and phrases which have one meaning in ordinary conversation or composition and quite another when they are used as technical words in relation to some special subject, and it is obvious that if this be the subject matter of the contract it may be supposed that the words are used in this specific sense. So, too, the situation of the parties at the

time and of the property which is the subject matter of the contract will often be of great service in guiding the construction, because, as has been said, the intention will be carried into effect, so far as the rules of language and the rules of law will permit. A party will be held to that meaning which he knows the other party supposed the words to bear if this can be done without making a new contract." See *1 Parsons on Contracts*, secs. 11 and 12; *2 Parsons on Contracts*, 14; *Lane v. Drinkwater*, 1 C. M. & R., 612. "Parties are not said to be joint in law merely because they are connected together in some obligation or some interest which is common to both of them; they must be so connected as to be in some measure identified. They have not several or respective shares which being united make a whole, but these together constitute one whole, which, whether it be an interest or an obligation, belongs to all;" *1 Parsons on Contracts*, 21. It is stated in the case that the parties plaintiff were owners in severalty of their respective shares in this vessel. The owner of shares in a British vessel is not a partner with the other owner or owners, but, by virtue of the statute law of the land, governing the interests of parties in such property, holds his shares as free from the control or interference of his co-owners as he would real estate or other property in which he has an absolute and an individual interest. This individual and several interest is known to all insurers as part of the law of the land, and this knowledge, even if the custom of trade and particularly of the business of insurance did not govern their construction, would be imported into these contracts and, if necessary effect the plain intent of the parties, control the popular sense of the language used in the contract." We are not informed in the case whether Mr. Hart, the agent effecting the insurance, was the agent of the individual owners or whether his authority to insure was a joint one, but the case does inform us that the interest of the insured was several, not joint, that the insurance was effected not for any specified owner or owners jointly or severally, but for "whom it concerned," and if the insurer is to be held to that meaning "which he knew the other party supposed the words to bear," I do not think a jury would hesitate long in declaring, nor

can the court refrain from declaring what, in view of the facts and the law, that meaning was. "The phrase, 'whom it may concern,' is a technical one, and is understood to mean not anybody who may have an interest in the thing insured but only such as are in the contemplation of the parties making the contract. Such a policy supposes an agency, and, proceeding on that ground, looks only to the principal in whose behalf, or on whose account, the agent moves in the transaction, and he for whose benefit the insurance is secured is the person, in the contemplation of the parties, whom alone "it concerns;"—and when Mr. Parsons says "where the expression 'all whom it may concern' or the like, covers many persons whose interests are not strictly joined, as partners, but several, as part owners, or tenants in common, each party may sue as on an independent policy made to him, unless the policy itself shows a joint contract," he can only mean that these words in the policy, in the light of the law as already stated, that an agency is always "implied in contracts of this character," and of surrounding circumstances, indicate a knowledge on the part of the insurers of the exact nature of the application, and an intention on their part to make a contract consistent with the character of the ownership and interest in the property insured and the relations of the several owners of that property to one another. In other words that the reasonable construction of the language of the policy, in the light of the known and recognized meaning attached to the words "all whom it may concern," if the presumption is that the insurer knew that each several owner intended to insure his several interest,—is that the contract was intended to be several, in the absence of words indicating a contrary intent. "The intention of the party who orders the policy determines who are the concerned under the general description though those intended are not known by the broker who effected the policy or by the insurers to be so;" *Phil.*, sec. 1960. And the same author says:—"On a policy in the names of parties jointly interested, the action must, as in other cases, be brought in their names jointly," but I can find no authority for the contention that the contract is joint. Where the interest is admittedly several, and where

the only indication of a joint contract is the insurance of a sum for "whom it may concern," and looking at the question apart from authority, it would, I think, be a dangerous as well as an unreasonable construction to put upon this policy. It certainly would startle a great many people who own shares in the large shipping interest in this Province, and who entrust the management of their property to agents or ship's husbands, being part owners with them, to learn that a policy on a ship covering the interest of the several owners and on which each pays the premium according to his individual interest, may be rendered worthless by the barratrous act of any of his co-owners, many of whom he has never seen and can know nothing of, especially as one of these co-owners, whose conduct may lead to these results, generally is master of the vessel, and is absent on foreign voyages, beyond the control of the other owners for years. In *Overston v. Ogle*, 13 East., 538, the case was this:—Part owners of a ship agreed each with the others that the ship would proceed on a voyage under the management of defendant, one of the owners, as ship's husband, and that on her return a full account should be made. Held several covenant, and BAYLEY, J., said:—"If the covenant to account were not several then the ship's husband, showing the account to any of the adventurers, would be an answer to an action for not showing it to any other and all the others might remain in ignorance of it." Apply the same argument from convenience to this case. One part owner on a policy for all concerned, held to be a joint policy, could take his share from the insurance and his release would be an answer to all the others; or as in this case the fraudulent act of a part-owner deprives his innocent co-owners of the security on which they relied. Of course in this case there is no question of collusion with the underwriters, but in looking at the danger of such a construction of the policy as is contended for by the insurers in this case, it is not untimely to refer to the possibility of such an occurrence. At the risk of unnecessarily extending these observations I must refer to the judgment of TINDAL, C. J., in 7 M. & G., *Mills v. Toddbrooke*. That was a covenant between A. B. of the first part, C. of the second part, and the several

parties who should execute the deed of the third part "as shareholders of a company about to be formed, and recited that A. and B. owned a colliery and that they agreed to sell to parties of the third part certain shares. The Chief Justice, after holding that there was enough on the face of the deed to enable the court to hold the covenant to be several, continues. "Now the first observation that arises is that the covenantees were not at that time partners. The deed expressly describes them as shareholders of a certain company about to be formed. Considering them to stand in that relation to each other, the interest which they had in the subject matter of this covenant appears to have been strictly and properly a several interest * * * and undoubtedly it would be a very inconvenient construction if we were to hold the action must of necessity be a joint action, for it could not be brought without the consent of the fifteen shareholders, who were not, as before observed, partners, but might be strangers to each other, and who have no authority to compel each other to join." POLLOCK, B., 3 Exch., 716, says: "If a covenant be so construed as to be ambiguous, that is so as to serve either the one view or the other, then it will be a joint covenant if the interest be joint, and it will be several if the interest be several. On the other hand if it be in its terms unmistakeably joint, then, although the interests be several all the parties must join in the action; so if the interests be made clearly several the action must be several although the interests be joint. It is a question of construction." It may, at the very least, I think, be firmly contended here that there is an ambiguity in the wording of the contract, that it "may be so read as to serve either one view or the other," and, if so, then on the high authority referred to, the interest being admittedly several, the covenant is several. But I do not wish to put this case, so far as I am concerned, on so narrow a ground, and have said, while expressing dissent from the opinion of my brother RIGBY with great diffidence and reluctance, I entertain a clear opinion that, upon a reasonable construction of this policy, in the light of the facts admitted on the case, and the principles of law applicable thereto, the contract of the insurers with those insured was a several contract, and that

each is entitled to recover on the policy on the vessel according to his interest.

In consequence of the division of opinion the cause was re-argued, December 13th, 1883, before the full court.

McCoy, Q. C., for plaintiffs.—(MCDONALD, C. J.—The question is whether a number of owners having authorized one of their number to insure for their benefit and he having done so, and a loss having accrued each owner can sue for his own interest or all must join.) Yes. The words "for whom it may concern" in a policy show an intention to insure individual interests. Parol evidence must be introduced to show who the parties concerned are and what their individual interests are. You must show not only an insurable interest but what the interest is. If A insures for himself and B and C, and C repudiates his authority and a loss accrues, A and B can recover to the extent of their individual interest. Who is the policy intended to cover? (RIGBY, J.—The interest of every one the broker intended to insure.) The broker does not know who is to be insured. He is instructed to insure for the benefit of whom it may concern. Suppose the broker intended to cover the interests of three owners and the mortgagee. There there would be different owners. (RIGBY, J.—In that case could a fourth owner come in? MCDONALD, J.—That is not this case. The intention here was to insure the interests of all. WEATHERBE, J.—The broker may not be able to say who he insures for. MCDONALD, C. J.—He might not know and yet the contract might be good. Take the case of a ship's husband instructing a broker to insure and the broker asks for whom and he replies for the owners. RIGBY, J.—There there is the intention to insure, but could a seaman come in and claim an interest on account of wages due him and the bottomry bond holder on account of his bond?) In *Jones v. Nicholson*, 10 Exch., 28, it was held that barratry by a master who is a part owner is no bar to recovery by the other owners. Part owners can sue; *Parsons on Marine Insurance*; 1 *Wendell*, 561, 571, 576. If two owners insure their own interest and the master being a part owner but not insured cast the vessel away, would that prevent the insured

from recovering. The question comes back then as to whether the contract is joint or several. In *4 Wendell*, 80, 83, the owners were insured. *5 Wendell*, 541, a part owner may insure his interest without specifying it. If the language is for whom it may concern, everyone having an interest may claim the benefit of the policy, but no one can recover more than the interest he proves; *7 Wendell*, 72; *11 Pickering*, 87, 88; *20 Pick.*, 259; *19 Pick.*, 34; *34 U. C. Q. B.*, 41; *12 Cush.*, 365; *5 Metcalf*, 192; *1 Metcalf*, 166. In relation to barratry of goods; *6 American Decisions*, 353; *13 American Decisions*, 358.

Ritchie, Q. C., contra.—Where a policy is for whom it may concern, only those can claim whose interest it was intended to cover at the time the insurance was effected; *1 Parsons on Marine Insurance*, 45. The intention of the party who effects the insurance determines the application of the clause. An intention to insure for two owners will not enable the others to come in. If an agent intends to insure the interest of an owner and does so without authority the owner, after the loss, may come in and ratify the insurance, but if the agent intends to insure only for half the owners the others cannot claim any benefit; *3 American Decisions*, 33. (WEATHERBE, J.—The intention must be shown by some acts. Suppose there was no intention.) Then it would be controlled by many circumstances. If he was acting for all, the court would assume that he intended to insure for all; *4 Wendell*, 80, 83. The onus was on the plaintiff to show a case in which such an action as this was ever brought. The contract is joint, and a contract with each individual cannot be introduced into it. All the parties must join or the action must be brought by the agent alleging interest in all and the fact of the master's interest is an answer. The only citation on the other side which is in point is that from *1 Parsons*, 48, in support of which no case is cited though *Parsons* is generally good authority. In the same book, 573 note 1, is a case in point. A case still more in point is given in *2 Parsons on Marine Insurance*, 450. If the contract is joint the plaintiff cannot recover if they leave two parties out. The reason why they were left out was to escape our answer. If

the captain was one of the insured he should have been included. The case in *1 Wendell* is precisely in point. In *5 Wendell*, 545 one of the parties insured for himself and sued and the others brought their action against him. It was admitted that if the insurance had been for all and the action had been against the company all would have had to join. On the general subject of joint and several contract, see *4 Q. B.*, 197; *1 Pugs. & Bur.*, 656. In determining whether a contract is joint or several the entirety of the consideration is material; *Parsons on Contracts*, 19. The case of *Melcal v. The London and Brighton Railway*, *4 C. B., N. S.*, 307, is very much in point. Another still more so is *2 C. & M.*, 679. All the words of the contract in question are joint and not several. It is not contemplated that each party may continue his insurance. It cannot be continued by one-half and dropped by the other. There is no law distinctly on the point that barratry can be committed by a master who is an owner against his co-owners. The case cited from *10 Exchequer*, 82, on that point was one of barratry of the cargo by the master which is different and does not cover this case. A case in *12 Cush.*, 360, is directly in point the other way.

McCoy, Q. C., in reply.—The case in *10 Exch.*, 28, was one of barratry of goods, but there was also barratry of the vessel. There must be barratry against the owners of the ship to constitute barratry against the owners of the goods; *1 Parsons on Marine Insurance*, 566, 567. As to whether the action must be joint or several cites *1 Chitty's Pleading*, 10; *1 Taunt.*, 501; *13 Mass.*, 529.

MCDONALD, J., (April 26th, 1884,) delivered judgment as follows:—

At the last argument we had not the benefit of the opinions delivered after the first by the learned Chief Justice and Mr. Justice RIGBY, but I have since read them and have come to the conclusion that this was a several, not a joint contract. The several interests of the assured are admitted, in the case, in these words:—"The schooner *Khedive* was insured by Levi Hart for and on account of Nathaniel S. Crowell who owned eight shares; David Smith, who owned four shares;

Howe Snow, who owned four shares" and so on, enumerating the different owners and their different shares. I cannot read these admissions in any other light than that, when the policy was executed, the insurers knew that Hart was acting for the different owners as well as what the shares were, and it is one of the "surrounding circumstances" which help to construe the policy and ascertain the intention of the parties. The insured, and each of them, of course knew their own shares, and did not necessarily know who the owners of the other shares were. They held quite independently of each other, and although Mr. Hart was authorized to insure these different shares—these distinct properties—for the different owners, it does not follow that he had the authority, or exercised it, to bring them all into hodge-podge, make the one responsible for the premium payable by the others, or liable to forfeit his rights under the policy because one of the other owners may have violated the condition upon which he held his intact. It cannot be said that the undertaking of the underwriters is a joint one, because, in addition to what I assume to have been their intention as gathered from all the other facts, they took care to qualify their liability by introducing the words "in our several proportions," "we the insurers will contribute each one according to the rate or quantity of his sum here assured;" and at the foot, "each underwriter, as above named, in the sum of twenty-five dollars." *Collins v. Posser*, 1 B. & C., 680, was debt on bond whereby Sir N. C., G. S. W., and J. W. acknowledged themselves held and bound to the plaintiff in £1000 each for which they bound themselves and each of them for the whole and entire sum of £1000 each subject to a condition that one J. B. M. would render a true account of all moneys received by him, as treasurer of the county of Middlesex. Held that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to others. The above is from the head-note. BAYLEY, J., said that the bond, as to the £1000 parties, is either a several bond or, to a certain extent, joint. If the former, it binds each to the amount of £1000, but if joint, then, you might sue them all three times over; and if only one were solvent he would be compelled to pay £3000;

whereas it is quite manifest that neither of them intended to be bound beyond £1000. I am therefore satisfied that the effect of the word "each" was to make this, not a joint, but a several bond." HOLROYD, J. and BEST, J., concurred. £1000 each would be £3000, and for this sum they bound themselves and each of them, if we decide by the literal meaning of the words used. Yet the court held that the bond was not a joint but a several one, giving as a reason that it was quite manifest that neither of them intended to be bound beyond £1000. I think that, in this case, it is equally manifest that the parties to this policy never intended to enter into a joint contract. The words of the policy itself do not appear to me to warrant the conclusion that they did, and when we view these words in the light of the admissions in the case I think we must conclude that the contract is several. Besides, it is questionable whether any owner of a share would have such an insurable interest in those of the others as to enable him to effect a valid contract of insurance on the latter, and I doubt whether, if all the assured had sued jointly, that fact could not be successfully pleaded and proved, as a valid defence, at least in part, to that action. *Campbell v. Jones*, 1 Pugsley & Barbidge, N. B., 657, was relied upon at the argument, and, if in point, would be entitled to much weight, even if standing alone, and much more because it was decided upon the authority of *Hatsel v. Griffiths*, 2 C. & M., 679, which was an authority entirely justifying the judgment of the Supreme Court of New Brunswick; but both were different from the case before us. *Campbell v. Jones* was an action brought by one of the owners, for his share of the purchase money, against the agent who sold all the different shares of the vessel under a certificate of sale signed by all the owners. The power which that certificate of sale contained enabled the agent to merge, in one or more shares, all the different shares which the owners then had, and Chief Justice ALLEN in his judgment, which would have been otherwise but for *Hatsel v. Griffiths*, quotes from PARKE, B., in the later case, who says: "Was the defendant employed by all to sell the entire ship, or only by each to sell his own share. * * * I think there was a joint employment by

all the owners to sell the entire ship, and if the defendant had sold the share of one separately, that would have been a breach of the contract. In that case all must concur before he is bound to pay over the purchase money." Can it be said here that Hart would be liable for a breach of contract for insuring the different shares for, and in the names of, the different owners? or that an insurance, so effected, would not be valid? and that is the point relied upon by PARKE, B. I think not, by anything that appears in the evidence. And if he had collected the money from the underwriters, and this action had been against him to recover the plaintiff's interest in the amount, which would make the cases more analagous: would it be open to him under this evidence to say that his authority was a joint one? I think it is beyond question that it would not, simply because there is nothing to show a joint authority. If the agents, in the two cases mentioned, sold to one person, as they might under that power, all the shares would have merged in one whole, for which they received in each case one lump sum. Here the shares and the different interests in them are, so far as there is any evidence, the same to-day as they were when the agent was authorized to insure, so that, although, at first sight, those cases appear to be in point, it is only necessary to read them to see that they are not. In each of them an authority was shown, and deemed to be joint because essential to effect the intended purpose. In this case there is no joint contract or authority shown, as between the owners and the agent, and it is not necessary to show, by direct evidence, that the authority was several, so as to enable the agent and underwriters to effect a valid insurance of the different shares separately. All that is necessary can be gathered from the facts, indicating what are the admitted several interests of the parties at the time. I think that the law and the authorities are entirely with the plaintiff, but I think so with all deference to the opinions of those who differ from me. In *Catlet et al. v. Pacific Insurance Company of New York*, 1 Wend., 561, it was held that extrinsic evidence was admissible to show who was intended to be embraced in a policy of insurance effected "on account of the owners," without a designation of the persons

intended to be insured, and two out of three owners, who cause an insurance to be effected for their separate benefit, may maintain an action in their own names on the policy, without joining the other owner as plaintiff, and this was a policy on cargo. This judgment was affirmed on error; *4 Wend.*, 75. *Foster v. M. S. Insurance Co.*, 11 Pick., 85, was a case where a policy of insurance was made on property on board a vessel for the benefit of the owners of the vessel, and extrinsic evidence was held admissible to show that the insurance was intended by the assured to cover both joint and separate property of the owners. At page 89 PUTNAM, J., said, "it has been contended for the defendants that this is a matter of construction, and that it is not competent to go out of the contract to ascertain the intent; that the phrase, "owners of the brig," means owners collectively and not severally, and that no recovery can be had but for the joint account. A more reasonable construction has been held in New York which we adopt. In *Catlet v. Pacific Insurance Co.*, 1 Wend., 561, the policy was effected by LeRoy, Bayard & Co., on account of the owners, on goods on board the *Sphinx*, and it was held that, where the assured were not named in the policy, it was competent to prove who they were by extrinsic evidence; that the plaintiffs were properly admitted to show that the insurance was effected by them to cover their own individual interests in the adventure. It will scarcely be contended that the use of the words in the policy, "on account of whom it may concern," does not justify, to some extent at least, the contention that the persons intended to be insured were the separate owners of distinct shares as such, because the shares of one do not concern those of another. It is admitted that all those whom it may concern—that is all those who have shares in the vessel—could successfully bring a joint action on this policy, but it is contended, at the same time, that no extrinsic evidence can be received to assist in ascertaining the true construction of the policy or contracts. But they cannot succeed in a joint action, any more than in several actions, without the aid of extrinsic evidence to show that they are the concerned ones intended by the contract,—because their names are not given in it, and

further they cannot show that itself, if not admitted, without producing the best evidence of which the nature of the case will admit,—which evidence necessarily discloses at the same time the several shares held severally, and therefore the separate interests in the subject of insurance. If extrinsic evidence is permissible in the one case to ascertain the intention of the parties and the true meaning of the contract, why not in the other? If, to show who all the concerned are why not to show the nature and extent of the concern, so as to ascertain, still further, the true intent and meaning of the instrument? In other words, if extrinsic evidence is permissible to show the names of the unnamed concerned, whose interests were intended to be insured, why not permissible to show the nature of the interests intended to be insured by the unnamed concerned? I must confess I cannot understand why not. And if the use of the words “on account of whom it may concern” renders, as it undoubtedly does, the meaning of the policy so uncertain as to require the assistance of extrinsic evidence to ascertain its true meaning to any extent, then we, having before us the evidence that the interests were several, have also the authority of POLLOCK, B., and other eminent jurists to hold that the contract, though joint if the interests be joint, is, in this case, several because the interests are several. The observations which I find it necessary to make do not, of course, apply to the case of insurance on the cargo, but I am of opinion that the plaintiff is entitled to recover, in this action, under the policy, on his share of the vessel.

MCDONALD, C. J.—I adhere to my former opinion.

SMITH, J.—I have come to the conclusion that on the weight of authority it is a separate contract.

WEATHERBE, J.—There is no authority directly on the point. The statement of the law in Phillips seems to be one way and in Parsons the other way. There is nothing, however, in Phillips so directly on the point as in Parsons, whose statement is clear that where a policy is made for whom it may concern the parties may sue according to their interest

whether several or joint, and I confess I cannot see, after a good deal of consideration of this case, how parties are to come in jointly and prove a joint contract when really they are several owners of the vessel. I think Parsons's doctrine is founded in reason, and therefore, although with hesitation, I concur in the view expressed by Mr. Justice McDONALD.

RIGBY, J.—I think judgment should be for the defendant.

THE EXCHANGE BANK v. BLETHEN.

Before McDONALD, C. J., and SMITH, JAMES, and WEATHERBE, J. J.

(Decided December 15th, 1883.)

Release conditionally executed.

THE plaintiff executed a release to the maker of a certain promissory note on which defendant was sued as indorser. The release was in the most general terms which were admittedly wide enough to include the note sued on, but it was signed in the following form: "The Exchange Bank of Yarmouth, N. S., for and in respect of and only for and in respect of the several claims, notes, bonds and securities for money mentioned and referred to in the schedule of the Exchange Bank of Yarmouth, N. S." The notes sued on were not included in the schedule.

Held, that the terms of the signature did not control the general provisions of the release and that plaintiffs could not set up that their execution of the instrument was void, after having received money from the estate on the strength of the assignment.

This cause came before the court, constituted as above, on a rule to set aside a verdict for defendant in an action against him as indorser of promissory notes. At the trial, which took place before WEATHERBE, J., without a jury, defendant relied on a plea of release of the makers of the notes, to which plaintiff replied limiting the release to certain notes, bonds and securities mentioned in a schedule annexed to the deed of release. The plaintiff's signature to the deed was expressed to be "for and in respect of and only for and in respect of the several notes, claims, bonds and securities for money, mentioned and referred to in the schedule hereunto annexed." The notes sued on were not included in the schedule referred to.

The rule to set the verdict aside was argued (Feb. 7th, 1883,) by *Kitchie, Q. C.*, and *Bingay, Q. C.*, in support of rule.

Pelton, Q. C., contra.

WEATHERBE, J., (December 15th, 1883,) delivered judgment as follows :—

Defendant who was liable to plaintiff as indorser on a promissory note seeks to rid himself of that liability on the ground that the makers were released by the plaintiffs by reason of their having become parties to an assignment executed by the makers of the notes for the benefit of all their creditors. It is admitted that if the makers are released the indorser is. The clause relied on as the release is the most sweeping in its terms and no controversy arises as to its language. The indenture of assignment is made between the assignors, the makers of the notes of the first part, Jacob Bingay, the trustee of the second part, and certain creditors of the assignors whose names are alleged to be in schedule A annexed to the instrument, and it recites that the assignors are indebted to the said parties in this schedule in the sums set opposite their names. The name of plaintiff is in the schedule with \$58,309.71 opposite. It is admitted that plaintiff executed the assignment within the required time, but did so in these words:—"The Exchange Bank of Yarmouth, N. S., for and in respect of and only for and in respect of the several claims, notes, bonds and securities for money mentioned and referred to in the schedule of the Exchange Bank of Yarmouth, Nova Scotia. The said claims as per said schedule amounting to \$73531.92 with interest,—by A. C. Robbins, President, (L.S.) A. S. Murray, Cashier." It was contended on the part of the plaintiff bank that the limitation or condition attached to their signature and the schedule by them annexed to the deed of assignment control the terms of the deed and limit the release. No authority has been offered to substantiate such a contention and I have no doubt that if it is to be held that the plaintiffs are in any sense parties to the deed they have released the makers of these notes from all debts whatever and therefore have lost their claim upon the defendant who was indorser. By the true construction of the instrument of assignment itself it must be admitted that it was the intention that all the creditors who executed the deed released every debt due at the time of the execution and none of those parties were ever to be paid

anything except what was secured to be paid by the terms of the agreement itself. It may be observed in this case that special provision is made in the assignment for revising or adjusting any amount at which any debt is fixed in the schedules originally attached to and which form part of the deed. The chief argument of plaintiff's counsel was based on the ground that the plaintiff has not legally executed the deed,—that the execution is wholly void on account of the condition attached to the signature. *Johnson v. Osenton*, 4 L. R., Ex., 111, is relied on by plaintiffs. There the question was whether parties signing the deed had given an effectual assent under the English Bankruptcy Act to the composition of the bankrupt so as to bind non-assenting creditors. The assent was qualified by reserving rights under a former trust deed and against securities held by the signing creditors. What was decided there was that the assent was not within the terms of the statute. *Wilkinson v. The A. C. G. M. Co.*, 12 E. L. & E., 445, decided on demurrer in the court of Queen's Bench was cited to us to show that the execution was void. The declaration there alleged that plaintiff duly executed a deed of settlement except as to a certain provision therein numbered 179 and that he was entitled to a certificate. Clause 179 was alleged to be part of the deed. Lord CAMPBELL on the argument remarked ; "I do not see how there can be a partial execution of the deed." He also said that a partial execution was unknown to the law and it was decided that the declaration contained no allegation of any execution at all. These cases do not, I think, throw light on the question raised. DRAPER, C. J., in *Fowler v. Perrin*, 2 U. C. Q. B., 230, decided that where there were words added to the signature which had no support from anything in the body of the deed they could not qualify or restrain the sealed release. The Supreme Court of Massachusetts decided in 1883, *American Bank v. Doolittle*, 14 Pickering, 123, where a creditor executed a deed of assignment for the benefit of creditors on condition that the property was not then attached, that this being upon a condition precedent which was not performed rendered the execution inoperative. It was observed by the court that if the condition was of such a

nature that it would render the instrument inoperative without the consent of the other parties then until such assent given expressly or by implication, the instrument as the act of the plaintiffs would be inoperative or the operation would be suspended. It was also said that "it was questionable whether a release could be executed upon a condition subsequent, for if the debt is once released it would seem to be gone forever." In a note to *34 American Decisions*, 542, a Pennsylvania case in *6 Wharton*, 262, is reported where to the signature of a creditor to a release under seal was appended a condition that the release should be inoperative unless twenty-five per cent of the claim was paid and the release was held to be absolute. The note is of value for the reasoning. "The condition will be considered inoperative because of its repugnancy to the assignment in pursuance of which it is executed, and because of its impossibility; since, as the fund realized by the assignment could be divided amongst those only of the creditors who executed absolute releases, no part thereof could be possibly distributed to a conditional releasor, and therefore if the condition were of any effect it must operate to defeat the release *in toto*. Also because as the release was absolute in terms it must operate to suspend the right of action of the releasor and a right of action once suspended cannot be revived. In other words a release cannot be executed to be void on a condition." *Teede v. Johnson*, 11 Ex., 845, was not unlike the present case. There was a recital in the deed of indebtedness to the parties of the second and third parts,—the trustees and other creditors,—in the several sums set opposite their names in the schedule, and then it was witnessed that the estate was assigned to pay the said parties the said sums in the schedule and then followed a general release. The action was by one of the trustees who set up by replication that he signed merely as trustee and that his debt was not in the schedule. It was held that the release being general in its terms the execution by plaintiff operated as an extinguishment of the debt. In the evidence before us it appears that plaintiffs were included with the preferential creditors for two thousand dollars on a particular transaction and have received that sum from the trustee in

accordance with the terms of the assignment. I suppose it will be admitted that this sum could only have been received out of the estate on the strength of the assignment, and it seems to me, whatever might be held as to the plaintiff's execution of the instrument being void if raised in some other way, that they cannot now, having received this sum, say by their replication here that they did not execute the deed and thus be rid of their obligation to release the assignor.

The rule *nisi* will be discharged with costs.

CASES
DETERMINED BY THE
SUPREME COURT OF NOVA SCOTIA,
DURING THE TERM
DECEMBER 1884 TO APRIL 1885.

BACKSTROM v. BECK.

Before McDONALD, C. J., and McDONALD, SMITH, and RIGBY, J J.

(Decided December 10th, 1884.)

Non-suit set aside.—False imprisonment and malicious prosecution.

IN an action for false arrest and malicious prosecution plaintiff proved that defendant delivered two gold rings to him to be made into one, that defendant refused to receive the ring so made on the ground that the price was too high, that defendant afterwards demanded the ring, which plaintiff refused to give up without payment, whereupon defendant caused plaintiff to be arrested and confined in the Police Office from Saturday till Monday, when, upon being brought before the Stipendiary Magistrate in the Police Court, he was discharged. The County Court Judge directed a non-suit and granted a rule for appeal.

Held, that the non-suit was irregular and must be set aside, and that the following record of the Police Court was sufficient evidence of the termination of the proceedings: "J. J. Beckstrom charge—stealing two rings (proa. J. Beck) discharged."

This was an action for false arrest, imprisonment, and malicious prosecution, tried before BLANCHARD, County Court Judge, at Halifax, in the absence of JOHNSTONE, County Court Judge.

From the evidence given on the part of plaintiff, who was a manufacturing jeweller, it appeared that he was entrusted by defendant with two gold rings to be made over into a new ring; that, after the work was completed, he took the ring to defendant's place of business for the purpose of delivering it

to him, but defendant declined to receive it on the ground that the amount demanded by plaintiff for doing the work was too large; that the ring was afterwards demanded of plaintiff but delivery refused until payment was made; that plaintiff was subsequently arrested on a warrant issued at the instance of defendant, charging him with "fraudulently converting or taking to his own use two gold rings of the value of fifteen dollars;" that after his arrest he was confined in a cell in the Police Office from Saturday afternoon until Monday forenoon, when, after having been brought before the Stipendiary Magistrate, he was discharged. The record of the discharge proved was as follows: "John J. Backstrom; charge—stealing two rings (pros. John Beck) discharged."

At the conclusion of plaintiff's evidence a non-suit was moved for, and directed by the learned Judge, who granted a rule for appeal.

Longley, in support of appeal, after referring briefly to the evidence, was stopped by the court.

Weeks, contra.—The plaintiff had no right to accept the non-suit. He should have refused to become non-suit if he thought the direction of the learned Judge wrong. Wherever the party complaining has been arrested under regular process, the action must be for malicious prosecution, and in order to succeed there must be proved (1) malice, (2) want of probable cause, and (3) that the proceedings have terminated. Here none of these has been shown. The Judge has found everything against the plaintiff. He finds that he is not entitled to recover either on the law or the evidence. He tries the case both as Judge and jury and the plaintiff rests, and a motion is made for non-suit. (MCDONALD, J.—I am disposed to think the Judge found everything in favor of the defendant but the question is whether he was justified.) There was no evidence of malice. Where a party acts under the instructions of counsel, before whom he has laid a *bona fide* statement, there is reasonable and probable cause. Malice must be found independently. (RIGBY, J.—If the evidence shows a want of reasonable and probable cause that of itself is evidence of malice.) Malice as well as want of probable cause must be

established ; 1 *Marsh.*, 12 ; 5 *Taunt.*, 187. As to want of malice and want of reasonable cause, see 5 *C. & P.*, 4. Something beyond the mere prosecution must be shown. Malice is not to be assumed ; the inference is the other way. (RIGBY, J.—It seems to me that on the evidence there was a want of reasonable and probable cause. I think this is evidence of malice. McDONALD, C. J.—A workman goes with the work he has done to the person for whom he has done it, tenders the work and demands what he swears is a reasonable sum for doing it. The latter refuses to take it, and goes straightway and makes oath that the workman intends to steal his property and has him arrested and put in prison. Can there be better evidence of malice ? A mere apprehension without any evidence is not sufficient.) There are no grounds in the rule. The grounds must be specific. The Justice could only try the case by consent and there is no evidence of consent, or that the proceedings have ever terminated. The plaintiff was tried under the Summary Convictions Act, and there must be some proper evidence of the termination of the proceedings. What the Justice was obliged to do under the Act appears in the Acts of 1869, chapter 31, sections 41, 42 and 43. If the charge was investigated under the act the evidence of the discharge must be that which the act prescribes. Under the Indictable Offences Act also there is a regular form. As to malice, cites 6 *D. & R.*, 8. As to suspicion 6 *M. & S.*, 32. If your Lordships think that on all points we are not entitled to succeed we ask that the court exercise its power to hear the evidence of the defence here and terminate the case rather than send the case back for a new trial. The record of the police court is not evidence of the discharge of a man proceeded against for an indictable offence. As to reasonable and probable cause cites 7 *H. & N.*, 56 ; 7 *C. B.*, 141 ; *Robinson & Joseph's Dig.*, 3796. Evidence of express malice is required as well as of want of reasonable and probable cause ; 3 *Dowl.*, 160 ; 4 *Burr.*, 1971. As to communication to counsel as evidence of reasonable and probable cause cites *R. & J. Digest*, 2147 ; 12 *C. B.*, 633 ; 6 *C. P.*, 14 ; 9 *C. P.*, 250 ; 8 *Q. B.*, 518 ; 11 *Q. B.*, 91.

Longley was called upon in reply on the two points as to assent to the non-suit and the termination of the proceedings. We did object to the non-suit. (RIGBY, J.—Why did you not get the Judge to place it upon his minutes. McDONALD, J.—It seems to me that your position is better than in cases where there was matter to submit to the jury.) The Judge here directed the non-suit and granted the appeal. The best evidence that the case admits of is given of the termination of the cause. We give the record of the discharge made under the instructions of the magistrate. The plaintiff was tried under the Police Court Act, Acts 1865, chapter 87. The powers given here have never been taken away.

Judgment was reserved, and on the following day (December 10th, 1884,) McDONALD, C. J., said the court were unanimously of opinion that the non-suit directed below was irregular, and could not be sustained and must be set aside.

HAYDEN v. McNUTT.

Before McDONALD, C. J., and McDONALD, SMITH, RIGBY and THOMPSON, J J.

(*Decided December 16th, 1884.*)

Rule nisi below amended and made absolute on terms.

On appeal from the judgment of the County Court refusing to set aside a default where the writ had not been personally served, the court, under rule 14, order 23, amended the rule *nisi* in the court below by adding a ground setting out that defendant had a defence on the merits and had satisfactorily accounted for his non-appearance, and made absolute the rule on terms of a bond being given to the County Court Judge to respond final judgment, defendant to pay costs of argument, and appeal, otherwise appeal to be dismissed.

This was an appeal from a judgment of the County Court Judge for District No. 1 discharging with costs a rule *nisi* taken to set aside the sheriff's return to the plaintiff's writ of summons, and the service of the writ, and the judgment by default entered up against the defendant, or, in the alternative, that the judgment be opened up and the default removed and the defendant allowed to appear and plead. The grounds mentioned in the rule *nisi* were want of personal service of the writ, and irregularity in the entering up of the judgment.

From the affidavits it appeared that a copy of the writ in question was sent by the sheriff to the defendant by mail with a request that he should acknowledge its receipt by signing and returning a written acceptance enclosed. The defendant verbally and otherwise admitted the receipt of the copy of the writ, but, acting under the instructions of counsel, and for the purpose of compelling personal service, did not sign the acceptance. The sheriff made his return in the usual form and upon this a judgment by default was entered. The defendant's affidavits, in addition to accounting for his non-appearance, disclosed a defence to plaintiff's claim consisting of a set-off and other matters.

Drysdale, in support of appeal.—My first ground is that there was no personal service of the writ, the sheriff having sent it by mail. Under our statute the service must be personal where practicable. My main ground is that our affidavits account for our non-appearance and disclose a defence on the merits. Sec. 48, chapter 94 Revised Statutes. The leading case as to personal service is *1 D. & L.*, 599. (McDONALD, C. J.—The defendant admits he received the writ. Is not that personal service? I say it is.) Under the authorities service is delivery of the copy and showing the original if required. (*Sedgewick, Q. C.*—The defendant swears he was served with a writ, a true copy of which is annexed. (McDONALD, C. J.—The defendant has accounted most satisfactorily for the delay. He was misled by his solicitor.)

Sedgewick, Q. C., and *Lyons*, contra.—The court must be satisfied that the defendant has disclosed a good defence on the merits. This does not appear from the affidavit. The rule *nisi* below did not contain as a ground for opening up the judgment that the defendant had disclosed a good defence on the merits, and had accounted for his non-appearance. The only ground on which relief was sought was irregularity in the service, and on that point the Judge held that the service was to all intents personal, especially in view of the fact that the defendant handed the writ to an attorney and made no objection until after judgment. If the defendant is allowed to come in now it must be on terms.

After taking time for consultation McDONALD, C. J., announced that the court were of opinion that under rule 14, order 28, they had power to amend the rule *nisi* in the court below and would direct accordingly that the rule *nisi* to remove the default be amended by adding as a ground that the defendant had a just defence on the merits and had satisfactorily accounted for his non-appearance; the rule *nisi* to be made absolute on a bond being given by defendant to the satisfaction of the County Court Judge, for District No. 1, to respond the final judgment in the cause. The defendant to pay the costs of the argument and of the rule below, and of the appeal, and to comply with the terms mentioned in twenty days; otherwise the appeal to be dismissed with costs.

IN RE ESTATE WILKIE.

Before McDONALD, C. J., and McDONALD, RIGHT and THOMPSON, J. J.

(Decided December 19th, 1884.)

Mental capacity.—Undue influence.

THE evidence upon which it was sought to set aside a will showed only marked eccentricities of behaviour, and the will, although made in favor of the solicitor of the testatrix, was shown not to have been prepared by him and to have been made without any pressure from him and as the free act of the testatrix.

Held, that the decision of the Judge of Probate sustaining the will must be affirmed.

This was an appeal from a decision of the learned Judge of Probate for the County of Halifax admitting to probate a paper purporting to be the last will and testament of Eliza Ann Wilkie. The will was contested on two grounds:—1st. The mental incapacity of the testator to make a will. 2nd. The undue influence of John Menger, the principal devisee. Respecting these points the learned Judge said:—

There is no doubt, from the testimony of all the witnesses, that the testatrix was a very eccentric person. Her eccentricity was displayed in a variety of ways; by her inordinate attachment to animals, particularly cats; by the peculiarity of her dress and by her manner. Some of the acts detailed exhibit a great degree of frivolity as well as eccentricity, but

eccentricity is no ground for setting aside a will, Sir James HANNAN, in the case cited above, (*Boughton v. Knight*, L. R., 3 P. & D., 64,) says: "Eccentricities, as they are commonly called, of manner, of habits, of life, of amusements, of dress, and so on, must be disregarded;" and in *Walkem on Wills*, page 104, it is said: "No case has yet gone the length of voiding a will on the mere ground of eccentricity in the testator." But it is contended that the evidence shows more than mere eccentricity; that the conduct of the testatrix exhibits mental incapacity. On this point it is well to advert to the testimony of the medical men who have been examined. Dr. Walsh had known the testatrix for many years; never however had visited her at her house, but simply saw her and prescribed for her at his office, where she was a constant visitor. He says, "Fifteen years ago her mental condition was then what one should call fair on an average." Some years after he perceived a failing mental condition, and he observed a gradual and certain change in her mental condition from that time down to the last time she consulted him. It was, he says, a mental failure; the mental failure showing itself in various ways; conduct; the expression of the countenance; the language; the confidential statements. He made up his professional opinion from observation and her own statements. He declined to go into details. He says further, "I cannot say she was insane, but her mind was in a very feeble condition."

Now, mere feebleness of intellect, short of what might by many be supposed to amount to idiocy, is not sufficient to render a will void, (see notes 1 and 7, *Williams on Executors*, page 16, 5th American edition); see also the same authority, (page 37) where the author says: "On the other hand, it must be observed that mere weakness of understanding is no objection to a man's disposing of his estate by will; the courts cannot measure the size of people's understanding and capacities, nor examine into the evidence and prudence of men in disposing of their estates."

Dr. Walsh also uses the word, "incapable," in reference to the mind of the testatrix, but he does not say to what extent she was incapable, or whether he considered her incapable of

making a will. Indeed, it would seem he was absent from the city, or rather was practising in Kentville, at the time the will was made, though he did not finally remove from the city until the month of March last, consequently he does not give his opinion as to the state of the testatrix at the most important period, namely, when the will was executed. He is contradicted by both Dr. Reid and Dr. Wickwire; the former her medical attendant at the time the will was made, and up to her decease; the latter an acquaintance of many years' standing, who had constantly seen and talked with her. Both of these medical gentlemen speak very favorably of her mental capacity, and the latter states, in answer to a question as to what was his opinion as to her capacity to understand the amount of her property and the disposing of her property, that he never noticed any particular insane delusion,—nothing beyond eccentricity. The two Misses Hodges are important witnesses, as they were very intimate with the testatrix during the last years of her life, and appear to have been her warm friends. Miss Jane Hodges, in particular, had frequent conversations with her, and discussed with her matters connected with the disposition of her property, but she says nothing more of her mental capacity than that she always thought her weak-minded. She says the testatrix was one of the best-hearted women she ever saw. She was perfectly capable of doing anything she was accustomed to do, such as receiving dividends, but "I don't think she could undertake any new business, nor could she do anything in a hurry." The evidence shows that the making a will was no new business on the part of the testatrix, and that she used due deliberation when performing that act. But it was beyond the power of Miss Jane Hodges to object to the capacity of the testatrix to make a will, as she not only discussed the last will with her, but was also a party to the making of a codicil to it, which she would not, we may suppose, have done had she thought that her mental capacity was defective. Miss Ellen Hodges says she thinks the testatrix was of unsound mind since the law-suit, (referring to the case of Miss Hewison's estate); latterly she had been insane on the subject of marriage. On being questioned on cross-examination she

says she thought her conversation on the subject of marriage an evidence of insanity of mind, and her imagining that she was poor was another and very strong proof; she (the witness) did not know of any other reasons. These may be evidences of eccentricity, but they can hardly be supposed to indicate insanity;—if they did, insanity, would seem to be much more prevalent than it is generally supposed to be.

We have on the part of the executors the evidence of the two witnesses to the will, who testify unhesitatingly to the sanity of the testatrix, and whose testimony is always considered of the greatest importance. See *Estate of Lawrence Roche*, 3 R. & C., 552. Then there is the evidence of the Rev. Dr. Hill and the Rev. H. A. L. Almon, the clergymen of the church to which she belonged. The former speaks of her eccentricity, but says that independently of her eccentricity she was a strong-minded woman; and the latter, who visited her during the last months of her life, particularly in an illness which occurred in February last, says he did not consider her a particularly weak-minded individual. He thought she was rational from what he saw of her,—he thought she was a woman of average mind. He observed that she was eccentric in her fondness for cats, and her desire that all the brute creation should be taken care of, but in other respects she was perfectly rational. I have already adverted to the evidence of Dr. Read and Dr. Wickwire, in favor of the sanity of the testatrix, and I need scarcely allude to the other witnesses, whose evidence is to the same effect. The evidence of Mr. John Menger I shall refer to, more particularly, in discussing the second point.

In reviewing the evidence, and in applying the tests given by the authorities, I can come to no other conclusion than that the testatrix, Eliza Ann Wilkie, was of sound and disposing mind at the time she made the will in question; that she was fully able to comprehend the extent of her property and the nature of the claims of those whom she excluded from participating in that property.

2. But was there undue influence exercised on the part of Mr. John Menger to induce the testatrix to make such a will? Mr. Menger had very intimate relations with testatrix; latterly

he was her solicitor, and he had for some time acted as her agent. Now it is laid down, (*Williams on Executors*, page 311.) "that although the rule of the Roman law, '*Qui se scripsit haeridem*' could take no benefit under a will, does not prevail as the law of England. Yet when the person who prepares the instrument or conducts its execution is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicions of the court, and call on it to be vigilant and zealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed and it is judicially satisfied that the paper does express the true will of the deceased." In this case Mr. Menger himself did not make the will, but it was made by his partner, and he was cognizant of its provisions. Now if the testatrix had been married and left a child unprovided for; or if she had some very near relative living with her, to whom she had placed herself '*in loco parentis*' and whom she had led to expect that a provision would be made for her, then a will which deprived such persons of their reasonable expectations, in favor of a stranger or professional adviser, might be considered inofficious and would require the very strictest scrutiny. But in this instance there were no such relationships existing; the testatrix was living alone; she was the last of the family; she had no near relations whatever; the petitioner, Mrs. Hamilton, not only very remote, as to pedigree, but living in a foreign land, with but little communication passing between them; a letter of the testatrix to the petitioner is produced, which merely expresses a kindly regard and gratification that the petitioner had named her child "Wilkie." Beyond this we have nothing but what is contained in the evidence of the Misses Hodges. It is very evident that if the petitioners, Mrs. Hamilton, and her brother, Walter Clarke, were not named in the will, it was not for want of prompting on the part of these ladies, who honestly thought themselves entitled to her property, and who were desirous that they should be substantially remembered. But the testatrix evidently evaded their solicitations; to Miss Jane Hodges she spoke of them as her heirs, and as having provided for them, but she never said in what manner she had done so,

or entered at all into particulars on the subject. The conversation, Miss Hodges says, took place two years ago, and since then she says the testatrix has made two wills. Practically then the testatrix considered herself as alone, as having no friends or relations to whom she cared to leave her property, and as being able to do as she pleased with her own money. Mr. Menger gives a history of his first acquaintance with her; he was then a clerk with Mr. P. C. Hill, and had been very attentive to her matters in that capacity; had no doubt pleased her. Several of the witnesses on both sides testify as to the regard she had for him, and of her regret that she had not known him before. She asked him to become her residuary legatee; he declined at first, and a will was made in Mr. Hill's office which did not include him in its provisions; she asked him again, and on consulting with his friends, he finally consented, and a will was made in Mr. T. Ritchie's office, in which he was made residuary legatee. This will was subsequently destroyed and another will was made for the testatrix by Mr. Meynell, and three wills subsequently by Mr. Wallace, all of which made Mr. Menger her residuary legatee, and the latter made him devisee of the house. The last was drawn as before mentioned by Mr. Power, the partner of Mr. Menger. Mr. Menger denies that he ever, either directly or indirectly, used any influence to induce the testatrix to insert his name in her will; his statement of facts is corroborated in several particulars by Mr. Geo. Ritchie, Mr. Meynell, Mr. Wallace and Mr. Power.

The first will in which Mr. Menger's name was introduced was made some time before he was admitted to the bar. The relation, therefore, of solicitor and client did not exist; it was made in Mr. T. Ritchie's office, who might have been called as a witness if Mr. Menger's statements were untrue; after Mr. Menger was admitted he had done the testatrix a substantial benefit in collecting moneys for her, for which she was always very grateful and said if she had known him before she would not have been robbed of her property. The law relative to undue influence is to be found in *Mountain v. Bennett*, 1 Cox., 355; *Hall v. Hall*, 1 L. R., 482; and *Boyse v. Rossborough*, 6 H. L. Cases, 51, the latter being the leading case

upon the subject. From these authorities it will appear that "if dominion were acquired by any person over a mind of sufficient sanity, for general purposes, and of sufficient soundness and discretion to regulate his affairs in general, if such dominion or influence were acquired over him in order to prevent the exercise of such discretion, it would be equally inconsistent with the idea "a disposing mind;" *I W. on Executors*, 44. But such influence, the author goes on to say, "to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; further, there must be proof that the act was obtained by this coercion or by importunity which could not be resisted, that it was done merely for the sake of peace, so that the motive was tantamount to force and fear." Now no such influence as mentioned in these authorities appears in the evidence. Miss Hodges testifies that in her conversations with the testatrix, she was made aware that Mr. Menger was to be her residuary legatee and to have the house. There was no concealment about it; when changes were made in her later wills, Mr. Menger's position was untouched. The testatrix appears on the evidence to have been of an obstinate disposition, one determined to have her own way, a most exacting client, as Mr. Russell says, very fussy and particular, and irritable and complaining if her matters were not attended to to her satisfaction; so much so that Mr. Russell did not care to have her business, and Mr. Menger in one instance had to tell her that if he did not please her she would have to employ another lawyer. All this is quite inconsistent with any presumption of undue influence on the part of Mr. Menger in reference to the will. I must conclude that there is no ground for this contention.

I therefore pronounce in favor of the validity of the will of Eliza Ann Wilkie, and confirm the Probate thereof which has been granted to her executors.

Drysdale, in support of appeal.—The points on which I rely are, (1) that the testator was not of sound and disposing mind and memory, and (2) that the will was prepared by a solicitor in his own favor who took \$20,000 out of an estate of \$26,000. Where there is any trace of fraud the will

should not be admitted. Dr. Walsh's testimony is the principal evidence of incapacity and it is on that that we mainly rely. (MCDONALD, C. J.—I would like you to point to the evidence of any one party who has testified to any act indicating incompetency. With all deference to medical men I would not give two-pence for all their scientific opinions on a point like this if people in the community who knew the testatrix all her life testified to her competency.) Dr. Walsh's testimony is of more weight here than that of other medical men because he was the attendant of the testator. (MCDONALD, C. J.—We cannot balance the opinions of these medical experts. RIGBY, J.—If there was no other medical testimony than Dr. Walsh's, and the Judge found as he has done in this case, we could not set his finding aside.) There is a case on that point in *8 Duval*, 335. The testimony in that case was a mass of contradictions. Unless the Judge has discredited witnesses this court can review the facts and say whether the inferences drawn by the Judge below are right. *Senile dementia* is one of the most difficult points the courts have to deal with; *Schouler's Executors and Administrators*, sec. 79; a good definition is given in *Redfield on Wills*, 63, 95. Dr. Reid was not in a position to say whether the testatrix was afflicted with dementia or not, or to give an opinion as to her mental condition. Dr. Wickwire's was only a street and shop acquaintance. (RIGBY, J.—What facts do you say the evidence shows to prove her incapacity?) Buckley, the druggist, deposes to her asking flighty questions and showing incapacity to manage her affairs. She bought articles and asked repeatedly whether she had paid for them. (MCDONALD, C. J.—Dr. Walsh expressly declined to say she was insane.) He says she was incapable. Doley deposes to her manner of life and the filthy condition of her room in consequence of the number of cats kept in the room. She frequently attracted crowds in the street by altercations with cabmen and truckmen. (MCDONALD, C. J.—She had a weakness for animals of all kinds, and it seems that truckmen made a practice of trying to excite her by pretending to illuse their horses when she was passing.) He says she was flighty in her conversation, and speaks of her laughing and crying alternately, and acting

in a peculiar manner in other respects. Mr. Naylor testifies to her showing him a German print as the picture of her own cat, and her acting in an excited manner at a public meeting and refusing to be kept quiet. Miss Hodges testifies to her commencing a sentence and stopping before she was half through, and speaking of something else, and forgetting the first. Mr. Wallace's testimony shows that the testatrix did not understand the meaning of the word "residue" and had to have it repeatedly explained to her. Mr. Harvie's evidence relates to a period three or four years antecedent to her death. Mr. Menger's evidence as to the testatrix's capacity is contradicted by all his own witnesses. Passing from the question of capacity my next point is that where there are suspicious circumstances or traces of frauds, the will should not be admitted to probate. In this case the will was drawn by the solicitor. (McDONALD, C. J.—But there were four previous wills in all of which Mr. Menger was residuary legatee. She seems to have taken a fancy to him and mentioned her intentions in reference to him to Miss Hodges.) She was Mr. Menger's client from the time he was admitted in 1880, and he did business for her previously while he was a clerk in Mr. Hill's office. He had not known her nine months when he had a will made in his favor which he says was the same as he has now. In *Ashwell v. Lorne*, L. R., 2 Prob. & Div., 477, the case was one of physician and patient; the will was drafted in the hand-writing of the patient and engrossed by a solicitor and executed by the testator, and it was said that if it had not been for a circumstance connected with a codicil by which the will was confirmed it could not be admitted to probate. The burden of proof is on the residuary legatee and the requirements are not satisfied. Comparing the last will with previous wills we have many alterations made against the declared intentions of the testator before she went to make the will. Legacies are reduced without anything to account for it. All the reductions are in the interest of the residuary legatee; *Von Stentz v. Comyn*, 12 Irish Equity, 622, is in point as to cases where confidential relations exist. All the instructions were taken by Mr. Menger. There is evidence of a codicil having been drawn

up which the residuary legatee is open to the suspicion of having destroyed. That codicil contained a legacy to Miss Green and there is no evidence of how much more. Mr. Menger denied to Mr. Eaton that up to the time of their conversation he had found any gold coin, whereas the evidence shows that he had found everything previously. Mr. Menger admits that he knew Miss Wilkie's relationship to the Hamiltons and Clarks; *3 M. P. C.*, 336. (McDONALD, J.—We agree with your law but at present we do not think it applies to the circumstances.) *Brown on Insanity* is the best authority as to what dementia is.

McDONALD, C. J.—We are all of opinion that the appeal must be dismissed. For my own part I concur in the opinion of the learned Judge of Probate and the reasons which he has given. If necessary I would not hesitate to use even stronger language than he has done.

RINES v. HERMES.

Before McDONALD C. J., and McDONALD, RIGBY, and THOMPSON, J J.

(Decided December 20th, 1884.)

Notice of trial not endorsed on writ.

DEFENDANT sought to set aside a default on the ground that there was no notice of trial endorsed on the writ of summons, although there was a notice to appear.

Held, reversing the judgment of the County Court Judge, that the default was regular.

Appeal from a decision of the County Court Judge for District No. 1, making absolute a rule *nisi* taken to set aside a judgment entered by default in a summary suit on the grounds, (1) that no notice of trial was endorsed upon the copy of the writ served upon defendant, and (2) that the defendant was not obliged to appear or put in grounds of defence until after notice of trial. The learned County Court Judge based his decision on the construction placed by him on the County Courts Act, section 87, and on a former decision.

Russell and Congdon, in support of appeal.—The section must be read distributively and in view of its purpose. (THOMPSON, J.—The object of the provision as to notice of trial being annexed was to prevent parties from trying causes the first term as they previously might do without notice.)

Lyons, contra.—There being no notice of trial the County Court Judge held that the defendant was not obliged to appear and plead. This has been the practice in the County Court for two years and it is a mere matter of practice. The object of the legislature was to make a distinction between summary and declaration suits. (THOMPSON, J.—No, it was to make a notice of trial necessary as it had not been before.) Taking that construction, under the old practice summary suits had to be tried the first day. The same policy is pursued yet. A summary suit cannot be continued as a declaration suit may be for three terms. (McDONALD, J.—Under the old practice if a summary case went over to another term a notice was required.) The act requires that the writ shall have endorsed two notices, and says that the defendant shall not be required to appear and file his grounds of defence until these two notices have been served the requisite time. If the notice of trial is not endorsed at the same time as the notice to plead the object of having summary cases promptly decided will be defeated. (McDONALD, C. J.—It seems to me to be utter nonsense to say that where all the facts are given to enable the defendant to answer, and a notice to answer, he shall not be required to do so unless another notice is added which is required for an entirely distinct purpose and which can have no effect until after the cause is at issue. McDONALD, J.—I think the language is apt and the meaning clear.) If your Lordships are against me on that point I take the further point that this is not an appeal on a matter of substance but on a matter of practice. (THOMPSON, J.—The plaintiff had a judgment by default.) It was a question of discretion whether the Judge would let the party in. (McDONALD, C. J.—It is not put on that ground, but on the ground that the default was illegally marked. If the County Court Judge has observed that practice for two years it may be ground for not giving costs.) The defendant should be

admitted now and not mulcted in costs. (McDONALD, J.—You have not shown merits or accounted for the delay.) We account for it on the legal ground. (McDONALD, J.—That is it. You were content to rely on your legal right. If you had been deceived by any matter of fact I would go with you the whole length. But you come in and defend on a strict matter of law, and because you are mistaken in that you argue that you should not pay costs.)

Russell replied.

The appeal was allowed reserving the question of costs. Subsequently the court, *per* McDONALD, C. J., announced that the costs would follow the rule.

QUIRK v. TWINING ET AL.

Before McDONALD, C. J., and McDONALD, SMITH, and RIGBY, J J.

(Decided December 19th, 1884.)

Appeal from interlocutory order.

AN order was made for a commission to examine a witness dated on a day when the court was sitting *in banc*, and signed by the Prothonotary in the usual form of orders granted by the court.

Held that, as the order was granted by the Judge before whom the cause was tried, and signed by the Prothonotary at his instance, it must be considered as an order made by the Judge in the course of the trial, and the motion to set it aside was premature.

RIGBY, J., dissenting.

Tupper moved (December 12th, 1884,) to rescind a rule absolute granted by McDONALD, C. J., granting leave to plaintiff after trial to produce evidence to prove the date of the loss of a vessel called the *Midus* mentioned in his declaration, by the examination of a witness by commission. The grounds relied on to rescind the rule were that no motion was made for the rule; that the rule was granted *ex parte* and without notice or argument, and was never shown to the other side. That, if granted at the trial, the rule should have been dated then; 7 *Jur.*, 339; that the trial had ended and no adjournment or postponement was had, *Order 34*, Rule 25; that notice was required of application to

adduce further evidence; *1 Ch. Div.*, 562; *Daniel's Chan. Prac. Form.*, 1451. That the application was not made in reasonable time or with due diligence; *7 Chan. Div.*, 394; *7 Ont. App.*, 646. That such indulgence is dangerous after the discussion of the case as it may lead to perjury; *19 Chan. Div.*, 380; *15 do.*, 166; *10 do.*, 579. That there must be strong grounds for admitting fresh evidence; *8 Chan. Div.*, 505; *4 do.*, 24.

Ritchie, Q. C., contra.—The plaintiff's vessel was insured in the Chebucto Marine Insurance Association on a time policy. The defendants wrote to say that the company were giving up business but that they would place the vessel, if the plaintiff wished it, in an American company that was equally good. They were authorized to do so and also to extend the time policy until the vessel's arrival. They wrote to plaintiff to say that they had insured the vessel for \$5000. Subsequently they wrote to say that they had only insured for \$2500 and that the balance was uninsured. By the same mail plaintiff received the defendant's letter and notice of the loss of the vessel. The policy for \$2,500 was paid and the action was brought for the balance. At the trial the point was taken that the actual date of the loss was not proved and an application was made to produce evidence on that point. The rule sought to be rescinded was granted to supply this evidence. The defendants can only attack the order on appeal. The court cannot reconsider the order of a single Judge. If the objection can be taken at all it must be on appeal from the whole judgment. The form of the order is good. The old form "I do order" is not now followed, but the ordinary form is "it is ordered." A motion was made on the conclusion of the cause for the examination of the witness and opposed by Mr. Tupper who insisted that if a commission was granted it should be on terms. Some days afterward the order was granted.

Tupper, in reply.—The granting of the order was not opposed. My objection was to such an application or order being made without notice. The order is in the form of an order granted by the Supreme Court in *banc*, and, on the day it was granted, no other court was sitting.

MCDONALD, J., (December 19th, 1884,) delivered judgment as follows :—

I refrain entirely from expressing any opinion upon the question whether the order or rule, which is sought to be set aside, is regular and proper or not, because that enquiry may, in the event of the learned Chief Justice giving a verdict in favor of plaintiff, come up at a more proper time for argument. At present I base my decision exclusively upon this,—that the application to review the ruling of the Chief Justice is premature while the trial in which the ruling was made is still pending and undetermined. It is admitted that none of the cases cited against the ruling is directly in point, and though I asked Mr. Tupper to give authority in support of his contention that this was the time to object, he entirely failed to do so. Before the passing of the Judicature Act and of the rules which that Act authorized us to make, such a thing was unheard of as the court in *banco* setting aside the ruling of a judge made at the trial of a cause and before the trial was ended. Did the rules and the Act or either of them change that state of things? I think not. If they did, then every order of the presiding Judge, made in the course of the trial, whether for amendment, adjournment or otherwise, would be, at once, subject to the review of the court in *banc*—resulting in an entire suspension of the trial—a thing which I am quite sure was not contemplated by the Legislature or by the Judges who framed the rules. I as one of the Judges would never have signed those rules if I thought that they were capable of such a construction, which I am quite sure they were not. If they were the effect would be that, instead of facilitating the trial of causes and the administration of justice, as intended, they would afford means to carry out the very opposite result—delay and unnecessary accumulation of costs. In the construction of statutes we must consider the object of the Legislature and the pre-existing evils which were intended to be remedied, but here we are asked to say that the effect of the statute is to intensify the evils and deny the remedy. I am of opinion that the ruling of the Chief Justice cannot *now* be set aside—that it is for him, during the time allowed for the trial of the cause, which time is not yet

elapsed, to direct whether or not a commission should issue to take further evidence and upon what terms, subject however to his ruling in that respect, being reviewed and set aside by the full court at the proper time on good cause shown, but I think that the costs of this application should, under the peculiar circumstance of the case, be costs in the cause and abide the final event of the suit. I attach no importance whatever to the fact that the rule was granted on the first day of the term and signed on that day by the prothonotary, as we all knew that it was not based upon any other decision than that of the Chief Justice who was trying the cause during the pendency of the trial, and apart altogether from any ruling of the court in *banc*, though the Chief Justice happened to be sitting with the other Judges in *banc* at the time that he authorized the prothonotary to sign the rule. The application was not an application at Chambers for an order of the Judge, but it was the ruling of the court constituted to try the cause and before the trial was ended ; and I think it was properly signed by the prothonotary who, as prothonotary, was as much bound to note the ruling of the Judge at the trial of that cause as he would be to note the ruling of the court in *banc*. But in any case I entertain no doubt that the ruling is subject to review and may eventually be held to be wrong, though, I think, this is not the proper time.

MCDONALD, C. J., and SMITH, J., concurred.

RIGBY, J.—The rule attacked by this motion was not made during the trial of the cause, as it recites it was, for the affidavits show it was made *ex parte*. If the trial had been adjourned to a future day, and on such day the Judge had made the order, it would then have been made during the course of the trial, but that was not the case. Nor was it a decision at Chambers, for the rule does not bear the name of the Judge as it would have done in such a case. It is a rule purporting to have been made either by the court composed of the Judge trying the cause during the trial or by the court in *banc*, and it is not therefore a case in which the moving party is bound to go to the Judge himself in the first instance to move against an *ex parte* order, but I think he must come

to the court, either by appeal from the rule complained of, or by a motion to set it aside ; and here he comes before us in both ways. If the defendants awaited the final decision of the cause to raise the question of the validity of this order by their general appeal, they would be met by their inability to urge against the Judge's minutes, that the order was not made during the trial but was *ex parte*. It will not, I think, be contended that an order to allow a witness to be examined in a cause by commission can be granted *ex parte*, and because such an order has been made in this cause I think it should be set aside. I must not be understood as favoring the view that a litigant is at liberty to appeal from rulings of the Judge during the trial, but that this order was not so made ; and it seems to me that defendants would be left without a remedy if they had not come at this stage to urge their objections against it.

For these reasons, I think, the rule asked for should be granted.

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ABSCONDING DEBTOR PROCESS.

When the appraisement shows that the appraisers were sworn and the sheriff's return refers to the appraisers' warrant, the swearing of the appraisers sufficiently appears.

"Service on the agent of process to appear," in sec. 26, cap. 97, R. S., (4th Series,) means service on the company's agent of process requiring the company to appear.

Levy under the attachment under that chapter may be made before service on the agent.

The levy is effectual from the time of seizure of the property and not merely after appraisement and selection of the property to be held to respond the judgment.

The Merchants' Bank v. The Steel Company of Canada, Limited.... 258

See also PRACTICE.

ACCRETION, TITLE BY.

See POSSESSION, TITLE BY.

ADMINISTRATION, TO WHOM GRANTED.

The Judge of Probate granted administration of the deceased to two sisters of deceased and one Shearer, the husband of one of the sisters. On petition of a brother of deceased the letters of administration were cancelled. Among the grounds set forth in the petition of the brother which resulted in the cancellation it was alleged that the petitioner had not been cited and that Shearer was indebted to deceased on mortgages and otherwise. Other grounds were set forth upon which no evidence was adduced.

Held, that it was not necessary to cite the petitioner when the administration was granted to the next of kin, (of whom the two sisters were a majority), and that there was nothing to prevent the Judge of Probate in his discretion from appointing a mortgage debtor of deceased, and no objection to associating the husband of one of the next of kin in the administration at their request.

Q. Whether the Judge can revoke letters of administration once granted for any reason other than those mentioned in the statute.

In Re Hatley 378

AFFIDAVIT OF INFORMATION AND BELIEF.

See PRACTICE.

AFTER-ACQUIRED PROPERTY.*See BILL OF SALE OF AFTER-ACQUIRED PROPERTY.***ALTERATION IN NOTE.***See PROMISSORY NOTE, ALTERATION IN.***APPEAL FROM JUDGE IN EQUITY.**

The expression "matters of practice" used in sec. 73 of cap. 95, R. S., (4th Series,) of Procedure in Equity, as not being subject to appeal, refers only to those matters of mere procedure in which the Judge has a discretion but not involving any legal principle.

The decision of the Judge in Equity on the following points was held not subject to appeal :—

1. That no exceptions can be taken to an answer in the Equity Court of Nova Scotia, but all objections must be taken by demurrer.

2. That none of the exceptions to defendant's answer were taken in time.

3. That the exceptions were not set down for argument in the time allowed, and could not be so set down afterwards without an order.

4. That the parts of the bill alleged to be insufficiently answered were not set forth in the exceptions nor referred to with certainty.

Ground of appeal, that the judgment is contrary to law and equity, *held* too general.

Held, that defendant, having undertaken to make an account part of his answer, could not be heard to say that the bill did not ask for it.

Where plaintiff took thirty-one exceptions to defendant's answer, on four of which defendant succeeded on appeal, plaintiff was ordered to pay four thirty-firsts of defendant's costs of appeal and defendant twenty-seven thirty-firsts of plaintiff's; the costs to be set off.

Burkner v. Wallace..... 504

———, POWER TO REVIEW EVIDENCE ON.

*See NEGLIGENCE.***APPORTIONMENT, CONDITIONS AS TO, IN INSURANCE POLICY.***See INSURANCE, FIRE, 1.***ARBITRATION.***See AWARD.***ARBITRATORS, DISCRETION OF.***See AWARD.***ASSESSMENT.***See SCHOOL ASSESSMENT.***ASSIGNEE IN INSOLVENCY, APPOINTMENT OF.***See INSOLVENT ACT OF 1875.***ATTACHMENT AGAINST COMPANY.***See ABSCONDING DEBTOR PROCESS.*

AWARD.

The parties entered into a submission by which they referred all the matters in difference, &c., &c., and provided that the costs of the cause and of the reference, or in any matter relative thereto, should be in the discretion of the arbitrators: and further, that judgment should be entered upon such award for the amount thereof, and of the costs of suit and reference in the same manner as if the verdict of a jury had passed. The arbitrators made an award in favor of defendant, but said nothing as to the costs.

Held, that the award must be set aside.

Per RIGBY, J., that the cause should be re-submitted to the arbitrators.

MCDONALD, C. J., dissenting, held that, although the provisions of the submission as to costs were in apparent conflict, the intention was that in the event of the arbitrators not exercising their discretion as to the costs, they should follow the award as provided in the latter clause of the submission.

Tory v. The Municipality of Guysboro 32

_____, SILENT AS TO SET OFF.

An award professed to be made of and concerning all the matters referred in the cause or under the order, and the arbitrator awarded that the plaintiff had no good cause of action herein against the defendant, and that there was nothing due from the defendant to the plaintiff herein.

Held, that it was no objection to the award that no specific reference was made to a set-off claimed in the cause by the defendant.

Russell v. Cook 133

BANKRUPTCY, FOREIGN.

See FOREIGN BANKRUPTCY.

BILL OF SALE.

An assignment was made to plaintiff for the benefit of creditors, which the assignee,—having taken possession of the estate and effects,—delivered to the Registrar of Deeds at his house at 3 a. m., with instructions to record it as a deed and file it as a bill of sale. The Registrar did not mark it filed or file it as a bill of sale, or number, enter or index it in the book kept by him for entry of bills of sale, but recorded it in the usual way as a deed of land. It remained in his office until December 5th when it was, without any instructions from plaintiff, sent by mail to the residence of plaintiff, who was not then at home, and who did not personally learn that the deed had been returned until the 6th January. On the 9th January plaintiff returned the deed to the Registrar. In the interval the goods were seized under an attachment issued on the 22nd December and an execution upon a judgment obtained 2nd January against the assignor.

Held, that the assignment was of the class requiring to be filed under cap. 84. R. S., 4th Series; that the delivering of the instrument at the Registrar's house with instructions to file was sufficient; that the removal of the deed from the office could not, under the circumstances, be taken advantage of by an attaching or execution creditor who knew of its having been in the office; and that replevin for the goods could be maintained by the assignee against the sheriff.

Fisher v. Bishop et al. 451

BILL OF SALE OF AFTER-ACQUIRED PROPERTY.

G. D. being indebted to the plaintiffs, as security for the payment of his indebtedness, in instalments as agreed upon, executed a mortgage to plaintiffs of his stock in trade, and agreed to convey to them "all stock, which, during the continuance of the indebtedness, he might purchase for the purpose of substituting in place of stock then owned by him in connection with his said business." At the time of the making of the mortgage, in order not to affect G. D.'s credit, it was agreed that the mortgage should not be recorded until default was made. After default and the recording of the mortgage, G. D. executed an assignment of his stock, debts and all other property to the defendants in trust for the general benefit of his creditors. Defendants delivered to plaintiffs certain stock which they alleged to be all that remained of the original stock, and plaintiffs having brought a bill in equity to compel the defendants to transfer to them the balance of the stock assigned and for other purposes;

Held, per RIGBY, JAMES, and McDONALD, J. J., (WEATHERBE, J., dissenting,) that the contract in regard to the after acquired goods, was so uncertain that the court would not decree its specific performance.

Per WEATHERBE, J.—An agreement not to record a bill of sale is not a fraud.

McAlister et al. v. Forsyth et al...... 151
See also per Judge in Equity in *Creighton v. Jenkins et al.*..... 353

BILLS OF SALE ACT.

Chapter 84 of the Revised Statutes, (4th Series,) "Of the Prevention of Frauds on Creditors by Secret Bills of Sale," section I, enacted that "every bill of sale * * * whereby the assignee shall have power * * * to take possession of any property * * * shall be filed with the Registrar of Deeds of the County * * * otherwise such bill of sale, as against * * * sheriffs * * * seizing the property under process of law, shall only have priority and take effect from the time of the filing thereof."

Held, not to apply to a case where the grantee under a bill of sale not filed had gone into actual possession of the property prior to the seizure by the sheriff.

McLean v. Bell et al...... 128

BURDEN OF PROOF.

See PRACTICE—Writ signed by Deputy.

CANADA TEMPERANCE ACT.

1. A conviction by a Stipendiary Magistrate was removed by appeal to the County Court and there quashed.

Held, that no appeal lay to the Supreme Court as none was expressly given by the act creating the offence and giving the appeal to the County Court, although the acts creating and organizing the County Courts gave a general appeal to the Supreme Court.

Costs refused to respondent as he should have moved to quash the appeal at an earlier stage.

McDonald v. McCuish..... 1

2. Defendant was convicted under one of the penal provisions of Part II. of the Canada Temperance Act, 1878. The provision for bringing that part into force enacted that after a poll had been held in any county, the Governor-General-in-Council might declare that the second part should be in force and take effect in such county

"upon, from and after the day on which the licenses for the sale of spirituous liquors then in force in such county," should expire, and that upon, from and after that day the second part of the act should become and be in force and take effect in such county. In the County of Kings, where the offence had been committed, the poll had been held and the Governor-General-in-Council declared by proclamation that the second part of the act should be in force and take effect "upon, from and after the day on which the annual or semi-annual licenses now in force in said county will expire." There were then no licenses in the county, and there had been none for years previously.

Held, that the conviction must be quashed, as no day had been fixed, either by the statute or by proclamation, for bringing the second part of the act into force in Kings County.

The Queen v. Lyons 201

COMMON CARRIER, LIABILITY FOR NEGLIGENCE.

Plaintiff delivered a planing machine to defendants to be carried between two stations. In placing it on board a car for that purpose defendants' servants injured the machine by negligence or want of proper appliances.

Held, that defendants were liable notwithstanding the special contract that the machinery was to be carried at the owner's risk.

Held, also, that this was not a suit "for indemnity for any damage or injury sustained by reason of the railway" under sec. 26 of the N. S. Railway Act 1880.

Whitman v. The Western Counties Railway Company 405

COMPANIES WINDING UP ACT.

1. *Held*, by SMITH, WEATHERBE, RIGBY and THOMPSON, J J., that a company, though incorporated in Great Britain, can be made the subject of a winding-up order in the Supreme Court of Nova Scotia, under the Winding-up Act of 1892, (Canada,) when the company is carrying on business in Nova Scotia, and has its management here altogether or in part.

Per McDONALD, J. —The Court has jurisdiction to make such an order when an act of the Provincial Legislature has conferred on the company the right to hold lands in Nova Scotia.

McDONALD, C.J., dissenting, on the ground that the winding-up act does not and could not confer jurisdiction over foreign companies.

Held, by McDONALD, C.J., and McDONALD, SMITH and WEATHERBE, J J., that a winding-up order must name the permanent liquidator, and could, therefore, only be made after notice to creditors, contributories, &c.

RIGBY and THOMPSON, J J., dissenting.

In re Steel Company of Canada (Limited) 49

2. An order was made for the winding up of the company, and, under that order, a provisional liquidator was appointed. The order was set aside as notice had not been given as required by the statute. Notice was thereupon given and a new order taken without any further petition.

Held, that no new petition was necessary.

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See also PRACTICE, Motion to Rescind.

COMPANY, ATTACHMENT AGAINST.

See ABSCONDING DEBTOR PROCESS.

CONCEALMENT.

See INSURANCE, MARINE, 3, 4.

CONDITION IN POLICY.

See INSURANCE, FIRE.

CONSIDERATION FOR PROMISSORY NOTE.

See NOVATION.

CONSTRUCTIVE TOTAL LOSS.

See INSURANCE, MARINE, 2.

CONTRACT, RESCISSION OF.

See RESCISSION OF CONTRACT.

COSTS.

See PRACTICE.

CRIMINAL PROCEDURE.

See DYNAMITE, INDICTMENT FOR KEEPING.

CY PRES.

See SCHOOL LANDS.

DEED, CONDITIONALLY EXECUTED.

The plaintiff executed a release to the maker of a certain promissory note on which defendant was sued as indorser. The release was in the most general terms which were admittedly wide enough to include the note sued on, but it was signed in the following form: "The Exchange Bank of Yarmouth, N. S., for and in respect of and only for and in respect of the several claims, notes, bonds and securities for money mentioned and referred to in the schedule of the Exchange Bank of Yarmouth, N. S." The notes sued on were not included in the schedule.

Held, that the terms of the signature did not control the general provisions of the release and that plaintiffs could not set up that their execution of the instrument was void, after having received money from the estate on the strength of the assignment.

The Exchange Bank v. Blethen..... 533

DEMAND AND REFUSAL.

See NEGLIGENCE.

DEPUTY CLERK, POWER OF.

The Deputy of the Clerk of the County Court held authorized to sign writs, although the Clerk be not ill, absent from home, or otherwise unable to attend to his duties.

Bank of Nova Scotia v. McKerrow..... 275

DESCRIPTION IN DEED.

See TRESPASS AND TROVER.

DYKE LANDS.

See Burnham v. Davison..... 388

DYNAMITE, INDICTMENT FOR KEEPING.

Indictment charging the defendants with having unlawfully, knowingly and wilfully deposited in a room in a lodging or boarding house, (described), in the City of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the subjects, &c., were in great danger;

Held good without alleging carelessness, or that the quantities deposited were so great that care would not produce safety.

WEATHERBE, J., dissenting.

The Queen v. Holmes and Brecken..... 498

EJECTMENT.

Plaintiff proved title to land under two grants from the Crown, but never resided on or had actual possession of it, the land having been occupied and worked for upwards of twenty years by his father, who was put on the place by plaintiff and partly supported by him. After the death of the father the land was occupied for two years longer by a son who had lived with the father but was not proved to have had any possession distinct from him. The son having died, plaintiff brought ejectment against his widow. A verdict having been entered for plaintiff by consent, subject to the opinion of the Court;

Held, that the verdict could not be disturbed. If the possession of the father was not the possession of the plaintiff and the latter was not entitled to succeed on that ground, he was entitled to recover as heir to his father, the only right of the defendant being to dower in her husband's share of the land.

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, EQUITABLE DEFENCE IN.

See PLEADINGS.

ENGLISH BANKRUPTCY ACT, JURISDICTION UNDER.

See Re Carvell, ex parte Gliddon..... 410

ESTOPPEL

The plaintiff in an action of ejectment relied upon a deed in dispute from H. M. to R. M. The only evidence of the execution of the deed was that of D. M., the witness, who testified to the fact of its registry. R. M. was ignorant of the existence of the deed for several years afterwards. At the time the deed was recorded a judgment was about to be registered against R. M.

Held, per RIGBY and WEATHERBE, J. J., that the defendants were estopped from denying the due execution of the deed from H. M. to R. M.

Per McDONALD, C. J., and SMITH, J., that there was evidence of the execution of the deed.

McDonald et al. v. McMaster et al...... 438

See also PRINCIPAL AND AGENT.

FALSE IMPRISONMENT.

In an action for false arrest and malicious prosecution plaintiff proved that defendant delivered two gold rings to him to be made into one, that defendant refused to receive the ring so made, on the ground that the price was too high, that defendant afterwards demanded the ring, which plaintiff refused to give up without payment, whereupon defendant caused plaintiff to be arrested and confined in the Police Office from Saturday till Monday, when, upon being brought before the Stipendiary Magistrate in the Police Court, he was discharged. The County Court Judge directed a non-suit and granted a rule for appeal.

Held, that the non-suit was irregular and must be set aside, and that the following record of the Police Court was sufficient evidence of the termination of the proceedings: "J. J. Backstrom; charge—stealing two rings, (pros. J. Beck) discharged."

Backstrom v. Beck..... 538

FILING OF BILL OF SALE.

See BILL OF SALE.

FISHING VOYAGE, ACTION FOR AMOUNT DUE SHARESMAN.

Plaintiff shipped for a fishing voyage on what is known as the "half clear lay," under which the master or owner fits out the vessel, the crew supply a portion of the provisions, pay the cook, &c., and the proceeds are divided in certain proportions. After the voyage had been partly prosecuted, and before it was completed, plaintiff was dismissed. In an action to recover the amount of plaintiff's share, there was evidence by the captain and by entries in defendant's books, of admissions of an amount due plaintiff, though it was contended that there had been no settlement. Judgment having been given for the defendant, an appeal was allowed and the cause ordered to be re-tried, as it might appear that plaintiff was entitled to something further than the amount admitted as due him.

Collie v. Bell, 4 R. & G., 134, distinguished.

Jones v. Locke..... 198

FORBEARANCE TO SUE.

Defendant was indebted to plaintiff's assignor, and, upon demand of the amount by the assignee, acknowledged the indebtedness and requested time for payment, promising, in consideration of the forbearance, to pay the amount to plaintiff. Plaintiff suing for the debt, objection was taken that he was obliged as assignee to give fourteen days' notice under the statute.

Held, that the forbearance to sue was good consideration and that plaintiff could recover on an account stated.

Parsons, Assignee, v. Maclean..... 45

FOREIGN BANKRUPTCY.

A County Court Judge was applied to to act in aid of, and as auxiliary to the London Bankruptcy Court, in relation to the property of an English bankrupt situated in his district, and made an order accordingly.

Held, (McDONALD, C. J., dissenting), that no appeal would lie from such order to the Supreme Court, either under the Insolvent Act of Canada which had given certain powers to the Judge in refer-

ence to insolvents, or under the County Court Acts, inasmuch as his order was not made by reason of any jurisdiction conferred by those acts, but by reason of the Imperial Bankruptcy Act which did not give such appeal.

Re Carvell, ex parte Gliddon..... 410

FOREIGN COMPANY.

See COMPANIES WINDING-UP ACT.

FRAUD.

See STATUTES OF ELIZABETH.

IN AGREEMENT NOT TO RECORD BILL OF SALE.

See per WEATHERBE, J., in McAllister et al v. Forsyth et al.... 151

INJUNCTION.

Plaintiff was assignee of certain chattel mortgages given by the firm of B. & B. and B. & Co. on goods contained in the premises occupied by them, and had entered and taken possession of the goods with the assent of one Blakely who represented both firms. Blakely subsequently executed an assignment for the general benefit of creditors, and gave a confession of judgment to Jenkins, one of the defendants, who entered up judgment and issued execution, under which the sheriff forcibly entered upon the premises and dispossessed plaintiff. Plaintiff thereupon applied for and obtained a writ of injunction enjoining defendants from selling the goods or removing the same or attempting to enforce the execution, and enjoining Jenkins from taking possession under the assignment to him. Plaintiff alleged in his bill that though he had had possession of the goods he had made no inventory and did not know the actual quantity of goods on the premises; that the members of the firm of B. & Co. had no means outside of the goods covered by plaintiff's mortgages and that unless plaintiff's claims were realized out of the goods he would suffer irreparable injury; that there was no adequate remedy at law; that the goods covered by the mortgages were insufficient to satisfy the amount they were given to secure; that the mortgages were given to secure plaintiff for accommodation and advances represented by negotiable paper which was daily maturing, and that unless plaintiff was permitted to sell the goods to meet said paper he would be obliged to sacrifice his private property and that the assignment and judgment to Jenkins were given fraudulently and for the purpose of injuring plaintiff.

Held, that the entry by the defendants was an act of trespass for which plaintiff had a complete remedy at law, and that plaintiff's remaining allegations were not sufficient to bring the action within the class of cases where a Court of Equity will interfere by injunction notwithstanding the existence of a remedy at law.

Creighton v. Jenkins..... 352

REFUSED TO RESTRAIN SALE WHERE DATE OF ADVERTISED SALE WAS PAST.

Plaintiffs had obtained a restraining order from the former Judge in Equity under a judgment which was reversed *in banco*, after which plaintiffs obtained from the present Judge in Equity leave to amend their bill, and applied for a second injunction, which was

refused on the ground that the case had not been varied by the amendment, and the Judge in Equity was bound by the judgment of the Court *in banco*. The appeal from this refusal was dismissed.

Per McDONALD, J., and THOMPSON, J., that there was no question to decide, as the injunction was to restrain a sale advertised for a day long since passed.

Per WEATHERBE, J., that the matter was *res adjudicata*.

JAMES, J., adhered to his judgment as Judge in Equity.

Johns et al. v. Barbour et al. 138

INSOLVENCY, EFFECT OF ON MORTGAGE OF SHIPS.

See MERCHANT SHIPPING ACTS.

INSOLVENT ACT OF 1875.

Held, that were the notice published in *Gazette* of the 19th and the meeting at which creditors' assignee was appointed was held on the 29th, the appointment was irregular and invalid "at least ten days notice" being required by the statute.

Parker, Assignee, v. Kenny et al. 457

INSURABLE INTEREST.

See per McDONALD, C. J., in *Howard v. Lancashire Ins. Co.*.... 172

INSURANCE, FIRE.

1. Plaintiff was insured by the defendant company under a policy which contained a condition for apportionment of loss with any other company in which plaintiff should be insured. Plaintiff was insured at time of loss in another company to the same amount as in defendant company, and defendant company contended that they were only liable for half the loss, and took a rule to set aside a verdict found for plaintiff for \$191.71 in excess of half the loss. The first-mentioned policy described the subject of insurance as "stock and tools in building and yard to the extent of \$1000." Under the last-mentioned policy, which apportioned the amount insured thus: "on stock in building, \$200; on stock in yard, \$700; on tools and benches in building, \$100," the plaintiff received \$144.97, which amount was \$191.71 less than half the loss.

Held, that the verdict could not be disturbed.

Evans v. The Stadacona Fire and Life Insurance Co. 88

2. The condition as to proof of loss specified nine distinct requirements, only three of which were complied with by plaintiff who relied on a waiver of the condition by defendants' agent. The proof of the alleged waiver consisted of a conversation between the plaintiffs' clerk and the defendants' agent, and between the latter and the plaintiff. In the first mentioned conversation all that was said by the agent was that he would send up an agent to investigate, and, again, that there would be no delay in payment when the proper papers were made out. In the conversation with plaintiff, the agent said that the papers had been sent to England and nothing would be done till their return. He said the fire was a fraudulent one, expressed wonder that plaintiff would trust a man like Strong, (the owner of the insured goods which plaintiff claimed by assignment), and plaintiff in his evidence as to this conversation added: He required me to do nothing more than what I had. He did not make any objection to the proof of loss.

Held, that there was no evidence of waiver.

Per WEATHERBE, J.—That the plaintiff's evidence simply meant that nothing was said by the agent as to the proofs of loss, and not that anything had been said to induce plaintiff to understand that objection would not be taken to the proofs.

Howard et al. v. The Lancashire Insurance Company..... 172

INSURANCE, MARINE.

1. Defendant resisted payment of a claim under a policy, on the ground that plaintiff's interest as mortgagee had been satisfied from the proceeds of a prior insurance. It appeared, however, that plaintiff had insured, not only to protect his mortgage, but on behalf of the owners, or if not so, there was ample evidence of ratification, and the Court therefore discharged the rule to set aside the verdict for plaintiffs.

Seaman et al. v. West..... 207

2. Plaintiff's vessel, badly injured at sea, was towed into Guantamano where there were no facilities for repairs, and where she should have had to remain, exposed to the depredations of worms, until spars, &c., were brought from New York. The owners abandoned but the underwriters refused to accept and made the necessary repairs at a cost greater than the value of the vessel restored.

Held, a constructive total loss of the vessel.

Troop et al. v. Jones..... 230

3. An application for a policy of insurance on a vessel contained the words, written on its face, "no other insurance," and the policy issued on the application so made contained the words, "warranted no other insurance."

Held, (McDONALD, C. J., dissenting,) that these words meant that there should be no other insurance on the vessel during the continuance of the risk.

Butler v. Merchants' Marine Insurance Company..... 301

4. When plaintiffs applied through their agent for insurance on goods the defendant was unaware of a disaster to the ship, known to the plaintiffs but not to the agent who made the application. Before the policy issued defendant became aware of the disaster to the ship and the Judge *at nisi prius* found, chiefly upon the defendant's own admission, that he did not issue the policy because of his supposed obligation under the slip, but elected to take the risk notwithstanding the disaster of which he had become aware.

Held, WEATHERBE, J., dissenting, that the plaintiff could recover, notwithstanding the concealment at the time of the application.

Held, that the Court *in banc* could receive the explanation of the Judge as to the nature of the question to which a statement of defendant on the minutes of evidence was an answer.

Royal Canadian Insurance Company v. Smith..... 322

JOINT DETENTION.

See REFLEVIN.

OR SEVERAL CONTRACT.

The case stated for the opinion of the court set out that the schooner *Khedive* was insured by L. H., for and on account of N. S. C., who owned eight shares; D. S., who owned four shares; H. S., who owned four shares, &c., and also on behalf of Nathaniel Snow and Jeremiah Snow; that while said policy was in force the vessel became a total loss by the barratry of Nathaniel and

Jeremiah Snow who were respectively the master and one of the crew, and were part-owners of the vessel. The policy was "on behalf of whom it may concern" and insured the sum in *sol do* on an entire ship for one premium.

Held, that the contract of insurance was several and that the innocent owners could recover notwithstanding the barratry of the other owners.

WEATHERBE, J., *dubitante*. RIGBY, J., *dissentite*.

Crowell et al. v. Jones 513

JURISDICTION OF JUSTICE, BEYOND LIMITS.

See STIPENDIARY MAGISTRATE.

LETTERS OF ADMINISTRATION.

See ADMINISTRATION.

LICENSE.

See RIGHT OF WAY.

MENTAL CAPACITY.

See WILL.

MERCHANT SHIPPING ACT.

The provisions of the Insolvent Act of 1875 with respect to conveyances made in contemplation of insolvency apply to mortgages on ships, notwithstanding the provisions of the Merchant Shipping Act as to such mortgages, and the provisions of the said Act and the Imperial Act to remove doubts as to the validity of Colonial Laws.

WEATHERBE, J., *dissenting*.

Kinney, Assignee, v. Jones et al 244

MISREPRESENTATION, EFFECT OF ON CONTRACT.

In an action on a promissory note given in payment for land purchased by defendant from plaintiff, the defendant relied on an alleged misrepresentation as to the quantity of land contained in one of the lots sold.

Held, there being no evidence that the misrepresentation, if made at all, was made falsely or with intent to deceive the defendant or to induce him to do that which he otherwise would not have done, that the defendant could not succeed.

Hill v. McLeod 280

MONEY PAID BY MISTAKE.

Rogers, of Yarmouth, having consigned fish to Antigua, instructed his agents to transmit proceeds by cable to the Bank of B. N. A., in Halifax. The agents, through their clerk, applied to plaintiff bank for a cable draft for \$3000 on New York, for which they gave their own check, and received an order in cypher to Maitland, Phelps & Co., in New York, to pay the amount to credit of Rogers to the Bank of B. N. A. The latter bank then, with the consent of Maitland, Phelps & Co., communicated with the defendant bank that their account "was credited with \$3000, payment by Maitland, Phelps & Co. advised from Colonial Bank of Antigua, account

Rogers." The defendant bank at once charged the amount to the New York agency of the bank of B. N. A., and credited the amount to Rogers on account of overdue bills.

Held, that, although the money had come into the hands of the defendant bank owing to mistake of Roger's agent in not transmitting the money to the Bank of B. N. A. at Halifax, as instructed, the plaintiffs had no title to it, having been paid by Roger's agent for their draft, and not being liable to return the money.

The Colonial Bank v. The Exchange Bank..... 215

MORTGAGE OF SHIPS.

See MERCHANT SHIPPING ACT.

MORTGAGEE RIGHTS OF, ON BOND.

Held, that a mortgagee who has foreclosed and sold and bought in the land at sheriff's sale and is in possession of the land can rank upon the estate of the mortgagor for the balance over the proceeds, and cannot be compelled to give credit for the actual value of the land.

Re Estate of Chandler..... 78

MOTION TO RESCIND.

See PRACTICE.

MUNICIPAL CORPORATION, LIABILITY OF.

Plaintiff, while crossing on horseback a bridge within the municipality, received injuries found to have resulted from the negligence of the corporation and its officers.

Held, that the defendant corporation was liable; that the fact of the bridge being on a highway was no defence, or, if a defence, should have been pleaded; and that no notice of action was necessary.

McQuarrie v. The Municipality of St. Mary's... 493

NEGLIGENCE.

Plaintiff brought action of trover and trespass for nets alleged to have been run over by the *M. A. Starr*, of which defendant was master, and judgment was given in the County Court for plaintiff.

Held, (WEATHERBE, J., dissenting,) that the presence of the steamer at the place where the nets were fouled was no evidence of negligence, as there was uncontradicted evidence that they were not fouled in the place where they were set, but had drifted.

Held, further, that a demand of satisfaction for the nets destroyed was not a sufficient demand on which to base an action of trover for the remnants of the nets taken on board the steamer and saved.

Per THOMPSON, J., that even if there was evidence from which the County Court Judge had drawn an inference of negligence, from the vessel being out of her usual course, such inference was open to review on appeal.

WEATHERBE, J., dissenting, found that there was evidence enough for plaintiff to prevent a non-suit, and the Court could not, on appeal, review the finding of the Judge on the facts where the only ground in the rule for appeal was that the judgment was against evidence.

Barrett v. Suttis..... 262

NEGLIGENCE OF MUNICIPAL CORPORATION.

See MUNICIPAL CORPORATION.

NOVATION.

A., who was indebted to plaintiffs, sold defendant a threshing machine, and in payment for the same, received from the defendant a promissory note, which, at A.'s request, was made payable to the plaintiffs. A. forwarded the note to plaintiffs in part settlement of their account against him. A. was not acting as plaintiffs' agent in selling the machine, did not inform them about the transaction, and had no agreement with them that the note should be taken in their favor.

Held, that plaintiffs could not recover because there was no consideration for the note moving from plaintiffs to defendant and no evidence to support a novation.

Cossitt et al. v. Cook..... 84

OVERHOLDING PROCESS.

See PRACTICE.

PLEADING, SUFFICIENCY OF ALLEGATIONS.

In an action brought for trespasses to plaintiff's mining areas, defendant justified as Commissioner of Mines under a forfeiture, and set out in one of his pleas, *inter alia*, that all proceedings requisite by law to be taken to effect a forfeiture of said lease were taken, and all necessary notices setting out defaults and breaches were duly given, and the defendant being such Commissioner duly gave judgment forfeiting said lease * * * in the form and manner prescribed by law.

Held, that this plea did not set out with sufficient particularity the steps taken to give the Commissioner jurisdiction to forfeit the lease.

Wallace v. Creelman..... 418

PLEADINGS.

EQUITABLE PLEA IN EJECTMENT.

Plaintiff in ejectment claimed title under a deed from his father. Defendant claimed under an unregistered agreement for a twenty years' lease, prior to the deed, of which he alleged plaintiff had notice. The deed was recorded.

Held, that the defence if good was an equitable defence only and could only be pleaded as such.

Hogg v. Shedd..... 490

IN TROVER.

In an action of trover for quartz, &c., defendant pleaded denying plaintiff's property in the goods, and gave evidence that the property had been seized under execution against the plaintiff and sold to a third party. The plaintiff at the time of the alleged conversion was out of possession.

Held, that as the plaintiff was out of possession, defendant could set up the *jus tertii* under a plea denying the plaintiff's property.

Campbell v. Yeadon..... 212

POLICY, CONSTRUCTION OF.

See INSURANCE, MARINE, 3.

———— ON BEHALF OF WHOM IT MAY CONCERN.

See INSURANCE, MARINE, 1.

POSSESSION, IN REPLEVIN.

See REPLEVIN.

———— OF GRANTEE IN BILL OF SALE.

See BILLS OF SALE ACT.

———— TITLE BY.

Plaintiff brought action against defendant for cutting a trench across his land to carry off water from dyked land on the Avon River. Defendant justified as a commissioner of sewers, but the justification broke down, as it was found that the trench was new work and no agreement had been come to as required by R. S. cap. 40, sec. 4. Plaintiff's possession, on which alone he could rely, consisted of cutting every year, by himself for five years and by his deviser for eight or nine years previously, the wild grass growing on the land in question between the ebb and flow of the tide, the land claimed by him having been marked off by stakes, one of which was permanent and the others replaced from time to time as removed by the tide. The Judge directed the jury that the plaintiff's possession was not in his judgment such as to support trespass and left to them two questions relating to the defendant's justification which the jury answered in the affirmative finding a verdict for plaintiff.

Held, that the plaintiff's possession was sufficient to support trespass, that the verdict settled the issue as to possession in favor of plaintiff, and that, if not, the defendant could not ask for a new trial in order that the jury should pass upon this question, the only grounds in the rule being that the verdict was against law and that the plaintiff had no title by deed to the land to which that claimed was an accretion.

Burnham v. Davison..... 388

———— UNDER ORAL AGREEMENT FOR LEASE.

A person in possession of land, under an oral agreement for a lease, has, against all others than the owner, the right to do all things which the owner could do to enable him to have the full enjoyment of the property.

McMullen v. Kendrick et al...... 308

PRACTICE.

ABSCONDING DEBTOR PROCESS.

It is no objection to a summons to bring in an agent under the absconding debtor process that a previous summons has been issued for the same agent.

Halifax Banking Co. v. Worrall..... 76

See also ABSCONDING DEBTOR PROCESS.

PRACTICE.

AFFIDAVIT OF INFORMATION AND BELIEF.

See infra, MOTION TO REScind.

AFFIDAVIT SWORN WITHOUT THE PROVINCE.

An affidavit to set aside pleas was sworn without the Province before a commissioner appointed to take affidavits for use within the Province, but was not authenticated by the seal of the commissioner.

Held, that the affidavit could not be read.

Levin et al. v. Briand 293

AGENT, SECOND SUMMONS TO SAME.

See supra, ABSCONDING DEBTOR PROCESS.

APPEAL FROM INTERLOCUTORY ORDER.

An order was made for a commission to examine a witness dated on the day when the court was sitting in *banc*, and signed by the prothonotary in the usual form of orders granted by the court.

Held, that as the order was granted by the Judge before whom the cause was tried, and signed by the prothonotary at his instance, it must be considered as an order made by the Judge in the course of the trial, and the motion to set it aside was premature.

RIGBY, J., dissenting.

Quirk v. Twining et al. 554

APPEAL FROM ORDER OF COUNTY COURT JUDGE QUASHING

CONVICTION UNDER CANADA TEMPERANCE ACT.

See CANADA TEMPERANCE ACT.

APPEAL, POWER OF COURT ON.

See infra, RULE NISI AMENDED.

ASSIGNEE, ACTION BY.

Defendant was indebted to plaintiff's assignor, and, upon demand of the amount by the assignee, acknowledged the indebtedness and requested time for payment, promising, in consideration of the forbearance, to pay the amount to plaintiff. Plaintiff suing for the debt, objection was taken that he was obliged as assignee to give fourteen days' notice under the statute.

Held, that the forbearance to sue was good consideration and that plaintiff could recover on an account stated.

Parsons, Assignee, v. Maclean 45

COMMISSIONER, AFFIDAVIT BEFORE

See supra, AFFIDAVIT SWORN WITHOUT THE PROVINCE.

CERTIORARI.

Rule absolute in the first instance to quash a certiorari on the ground that no steps had been taken within a year.

Queen v. Rines 87

PRACTICE.

COSTS ON AWARD.

See AWARD.COSTS REFUSED TO RESPONDENT WHERE HE SHOULD HAVE
MOVED TO QUASH APPEAL.*See* CANADA TEMPERANCE ACT, 1.

DEFAULT, FOR WANT OF NOTICE OF TRIAL.

Defendant sought to set aside a default on the ground that there was no notice of trial endorsed on the writ of summons, although there was a notice to appear.

He'd, reversing the judgment of the County Court Judge, that the default was regular.

Rimes v. Hermes..... 552

DEMURRER, "MATTER OF LAW" TO BE ARGUED, HOW STATED.

The only matter of law to be argued in a demurrer was contained in a note on the margin of the demurrer.

He'd sufficient to satisfy the statute, cap. 94, section 131, Revised Statutes, 4th Series.

Gourley v. Carter..... 83

DEMURRER TO RETURN.

See infra, MANDAMUS.

INFORMATION AND BELIEF.

See infra, MOTION TO RESCIND.

IRREGULARITY, WAIVER OF.

See infra, OVERHOLDING PROCESS.

JURISDICTION WHERE DEBT REDUCED BY CASH PAYMENTS.

Plaintiff sued on an agreement that he should receive \$300 as the full amount due him on a settlement of partnership accounts, said amount to be paid from proceeds of partnership debts to be collected. Defendant contended that none of the debts were collected before November, 1881, so that nothing was due until then; that the payments credited by plaintiff, being previous to that date, could not be connected with his claim, which was therefore beyond the jurisdiction of the court.

He'd, that the payments were made on account of the agreement, and that the debt having been reduced by cash payments, the plaintiff's claim was within the jurisdiction of the court.

Preedy v. Baldwin..... 80

MANDAMUS.

Preliminary objection that by the practice of the Supreme Court of Nova Scotia there can be no demurrer to a writ of mandamus, overruled.

The Queen v. The Warden and Council of Dartmouth..... 311

PRACTICE.

MINUTES OF TRIAL, EXPLANATION OF JUDGE.

Held, that the Court *in banc* could receive the explanation of the Judge as to the nature of the question to which a statement of defendant on the minutes of evidence was an answer.

Royal Canadian Insurance Company v. Smith..... 322

MOTION TO RESCIND.

Before an application is made to the court to rescind an order of a Judge, application should be made to the Judge who granted the order and the court will require positive proof that such application has been made. Affidavit of information and belief and statement of the Judge in court held not sufficient.

In re Steel Company of Canada (Limited)..... 17

NON-SUIT SET ASIDE.

In an action for false arrest and malicious prosecution plaintiff proved that defendant delivered two gold rings to him to be made into one, that defendant refused to receive the ring so made on the ground that the price was too high, that defendant afterwards demanded the ring, which plaintiff refused to give up without payment, whereupon defendant caused plaintiff to be arrested and confined in the Police Office from Saturday till Monday, when, upon being brought before the Stipendiary Magistrate in the Police Court, he was discharged. The County Court Judge directed a non-suit and granted a rule for appeal.

Held, that the non-suit was irregular and must be set aside, and that the following record of the Police Court was sufficient evidence of the termination of the proceedings: "J. J. Backstrom; charge—stealing two rings (pros. J. Beck) discharged."

Backstrom v. Beck..... 538

NOTICE OF ASSIGNMENT OF CHOSE IN ACTION.

See supra, ASSIGNEE, ACTION BY.

NOTICE OF TRIAL NOT ON WRIT, EFFECT OF.

Defendant sought to set aside a default on the ground that there was no notice of trial endorsed on the writ of summons, although there was a notice to appear.

Held, reversing the judgment of the County Court Judge, that the default was regular.

Rines v. Hermes..... 552

NULLITY, HOW WAIVED.

See infra WAIVER.

OVERHOLDING PROCESS.

The affidavit on which the application was intended to be made was served separately from the notice although both were served in due time. The statute had the words "with the notice."

Held by McDONALD, C. J., and THOMPSON, J., that the service need not be concurrent as "with" meant "also."

Held by WEATHERBE, RIGBY and THOMPSON, J. J., that the irregularity, if any, was waived by the defendant reading an affidavit in answer to the one so served.

Smith v. Smith..... 42

PRACTICE.

PLEA, NUL TIEL RECORD.

See infra, VARIANCE.

PLEADINGS IN ACTION OF TROVER.

See PLEADINGS IN TROVER.

RECORD ROLL, OMISSION OF DECLARATION.

See infra, VARIANCE.

RES ADJUDICATA.

See per WEATHERBE, J., in *Johns et al. v. Barbour et al.*..... 138

RESCIND, MOTION TO.

See supra, MOTION TO RESCIND.

REVIVOR.

See infra, VARIANCE.

RULE NISI BELOW AMENDED AND MADE ABSOLUTE.

On appeal from the judgment of the County Court refusing to set aside a default where the writ had not been personally served, the court, under rule 14, order 28, amended the rule *nisi* in the court below by adding a ground setting out that defendant had a defence on the merits and had satisfactorily accounted for his non-appearance, and made absolute the rule on terms of a bond being given to the County Court Judge to respond final judgment, defendant to pay costs of argument and appeal, otherwise appeal to be dismissed.

Hayden v. McNutt..... 541

SEAL ON WRIT, WANT OF.

See Bank of N. S. v. McKerrow..... 275

VARIANCE.

The omission of the declaration from a record roll which set forth the issue of the writ of summons, the names of the parties, the particulars of claim, the plea of confession, &c., *held* not to be such a fatal irregularity as would sustain the plea of *nul tiel record*, or prevent the admission in evidence of the roll.

Held, further that a variance between the date of the judgment as alleged and as it appeared on the record was not fatal, as this latter objection was not taken at the trial.

McLearn v. Lytle..... 37

VERDICT BY CONSENT, EFFECT OF.

At the trial, after conflicting evidence, a verdict was taken by consent for defendants with power to the Court to set it aside and enter a non-suit or verdict the other way.

Held, that all questions of fact must be treated as settled in the proper way by the verdict.

McMullen v. Kendrick et al...... 308

PRACTICE.

WAIVER.

The writ of summons will not be set aside for any defect therein after appearance and plea, whether the defect makes the writ a nullity, or only irregular.

A defect which makes a proceeding a nullity will be considered as waived when the cause has gone to another stage in which the validity of the proceeding has ceased to be important.

The Deputy of the Clerk of the County Court held authorized to sign writs, although the clerk be not ill, absent from home, or otherwise unable to attend to his duties.

Bank of Nova Scotia v. McKerrow..... 275

WRIT SIGNED BY DEPUTY.

A writ of summons was signed in the name of the clerk of the County Court by a deputy appointed by the clerk, who, it was contended, could only appoint a deputy to act for him when he was "absent from home, sick, or otherwise unable to attend to his duties."

Held, that the onus was on the party seeking to avoid the writ to show that when it was signed by the deputy the clerk was neither "sick, absent from home, nor otherwise unable to attend to his duties."

Kandick v. Arthur..... 289

See also DEPUTY CLERK, POWERS OF.

"PRACTICE, MATTERS OF," IN EQUITY PROCEDURE ACT.

See APPEAL FROM JUDGE IN EQUITY.

PREVIOUS VERDICT.

See VERDICT AGAINST CHARGE.

PRINCIPAL AND AGENT.

Plaintiffs who held a bill of sale on a quantity of lumber authorized its sale by M. & L. and assented to a sale to the defendants, to whom they represented M. & L. as owners. After the sale and part payment of the purchase money plaintiffs disclosed themselves as owners and demanded the balance due, which defendants, notwithstanding, paid to M. & L.

Held, reversing the judgment of the County Court Judge, that plaintiffs were entitled to recover as the real principals in the transaction, and were not estopped by the representation.

WEATHERBE, J. dissented on the ground that M. & L. were not shown to have acted as agents of plaintiffs.

Layton et al. v. Smith et al...... 331

PROCLAMATION, UNDER CANADA TEMPERANCE ACT.

See CANADA TEMPERANCE ACT.

PROMISSORY NOTE.

See NOVATION.

PROMISSORY NOTE, ALTERATION IN.

At the trial exception was taken to the reception of a note on the ground that it was not sufficiently stamped. The note had been drawn up, signed and stamped in the defendant's absence. When it was tendered to him he required an alteration to be made in the date, which was done by common consent.

Held, that the alteration did not necessitate a re-stamping because it was at most a mere correction of an error, and was made before the note was delivered.

Hill v. McLeod..... 280

PROOFS OF LOSS, DEFECTIVE.

See INSURANCE, FIRE, 2.

RATIFICATION.

See INSURANCE, MARINE, 1.

REGISTRY OF BILL OF SALE.

See BILL OF SALE.

REGISTRY OF DEED.

See McDonald et al. v. McMaster et al...... 438

RELEASE CONDITIONALLY EXECUTED.

See DEED.

REPLEVIN.

Chattels were sold by plaintiff to one S. Defendant, McK., claiming a right to them, took them from S., who demanded and received back the purchase money from plaintiff.

Held, that plaintiff could recover in replevin notwithstanding the sale to S., and although the goods were not in his possession when taken, McK. having seized the goods and deposited them with M., who held them on account of R., the other defendant.

Held, McDONALD, C. J., dissenting, that both defendants were liable.

Dobson v. McKay et al...... 5

RESCISSION OF CONTRACT.

Plaintiff and defendant entered into a contract that plaintiff should take defendant's mill, for a period of five years, put the same in repair, &c., and that defendant should furnish supplies, &c., and pay for all lumber cut at specified rates in the months of July and December of each year. Defendant failed to pay plaintiff a sum of \$900 due him on one of the December settlements, and plaintiff, having demanded the money of defendant's manager, was informed there was none for him. Plaintiff thereupon said he would have to give up the mill, in reply to which the manager said that that was "what the old man expected." Plaintiff and defendant's manager then went over the books and a balance was agreed upon as due plaintiff, part of which was paid, and for the balance of which the action was brought. In addition to the above there was evidence of a statement by defendant that he wished to get rid of plaintiff, who was getting "played out," and of his instructing his manager to keep \$100 back from plaintiff.

Held, (WEATHERBE, J., *dubitante*) that there was evidence to support a finding by the jury of a rescission of the contract and a promise to pay plaintiff the balance earned.

Held, also, objection having been taken to the sufficiency of plaintiff's particulars, that the verdict could be sustained under the item, "to amount due plaintiff from defendant for work and labor, and under the common counts \$1131.28."

Held, also, that the Judge was right in instructing the jury that evidence was of no importance of a conversation, after the rescission, in which defendant said he was urging plaintiff to go back to work and plaintiff made no reply.

Tracey v. Young 381

REVOCATION OF WILL.

See WILL.

RIGHT OF WAY, ACTION FOR OBSTRUCTING.

Plaintiff and one of the defendants divided a lot of land of which they were tenants in common into two equal parts, and executed a bond or agreement in the penal sum of \$200 for the purpose of securing to each of the parties the free use of all roads existing at the time on either of the lots of land. Plaintiff having brought an action for an alleged obstruction of one of the roads referred to, and having proved no title apart from the bond.

Held, that the action was wrongly brought, plaintiff's remedy being by action on the bond.

Also, that plaintiff was estopped by the agreement from setting up prescription, but defendant was not estopped from saying that there was no grant.

Per THOMPSON, J.—The words in the bond did not amount to an easement, but, at most, to a license or a covenant not to obstruct the way.

Also, plaintiff might have proved a title to the way independent of the agreement.

Whitman v. Jones et al. 443

SCHOOL ASSESSMENT.

M. Son & Co. carried on business in the City of Halifax, and also at Bedford in the County of Halifax, owning and occupying property liable to assessment for school purposes in both places. The members of the firm resided in the City of Halifax. Previous to the assessment of 1882 the firm made an assignment for the general benefit of their creditors to plaintiff, who was carrying on business at Bedford under the firm name at the time of the assessment, but also resided in Halifax. A portion of the property at Bedford assigned to plaintiff having been levied upon for rates claimed to be due for the support of schools in that section;

Held, WEATHERBE, J., dissenting, that after the assignment, under Revised Statutes, (4th Series,) chapter 32, sections 54 and 64, the property levied upon was only liable to assessment in the section in which the original owners last resided.

Graham v. Monaghan 186

SCHOOL LANDS.

Defendants were trustees of school lands in the Township of Cornwallis, the terms of the trust being that the lands should be held "in special trust to and for the use of one or more schools, as might be deemed necessary by the trustees, for the convenience and benefit

of all the inhabitants of the said Township of Cornwallis, and in trust that all the schools in the said township furnished or supplied with masters agreeably to the laws of the Province and contracted with for a term of not less than a whole year, should be entitled to an equal share of the rents and profits arising from said school lands, provided the masters or teachers thereof should receive and instruct, free of expense, such poor children as might be sent there by the said trustees." In 1873 all the schools of the Province were made free, and the object of the trust having failed, the funds were allowed to accumulate until 1879, when the defendants were about to appropriate the moneys to the erection of a school house in one of the sections of the township. A suit having been brought in Equity praying *inter alia* that the defendants might be decreed to divide the moneys equally among all the schools in the township, and that an injunction might issue to restrain them from applying the same or any part thereof to the erection or support of the proposed school house, the injunction asked for was granted on the ground that the proposed expenditure was in violation of the trust.

Held, on appeal, that the plaintiffs were entitled to the decree and distribution for which the suit was brought.

Per JAMES, J., dissenting, that the bill should be sustained and its prayer granted for an accounting with an injunction.

Attorney-General, on the Relation of Dickie et al. v. Axford et al..... 107

SPECIFIC PERFORMANCE.

See BILL OF SALE OF AFTER-ACQUIRED PROPERTY.

STAMPS ON NOTE, AFTER ALTERATION.

See PROMISSORY NOTE, ALTERATION IN.

STATUTES OF ELIZABETH.

M. & Son, being in insolvent circumstances, executed a deed of trust for the benefit of such creditors as should join in the deed, whereby they vested all their estate in a trustee, with provisions that the trustee should have a commission of five per cent on all moneys, and should carry on the business, if deemed expedient, for a period that might extend to three years, using so much of the property as might be necessary for the purpose of replenishing stock; that he should sell such portion of the real estate as should be necessary to carry on the business and pay taxes, &c., paying instalments amounting to forty cents in twenty months, and dividing the residue among all the other creditors of the grantors. The Judge, before whom the case was tried, found as a fact that the transfer was intended for the general benefit of creditors, without any fraudulent intent to defeat or delay creditors, and that the provision as to carrying on the business was subsidiary to the winding up of the business in fulfilment of the trusts.

Held, that, under this finding, which was justified by the terms of the transfer, the plaintiff was entitled to the goods included in the transfer.

Graham v. Bell..... 90

STIPENDIARY MAGISTRATE, JURISDICTION OF.

The defendant was brought before the Stipendiary Magistrate for the County of Halifax, and tried and committed for an assault on the high seas. The trial and conviction took place at the office of the Stipendiary Magistrate in the City of Halifax, which was outside the limits of the County.

Held, that the conviction, having been made outside the territorial limits of the magistrate's jurisdiction, was bad.

Querre whether if made at the dwelling house of the magistrate, though outside the limits of his jurisdiction, the conviction might have been covered by the Imperial Act, 9 Geo. I., cap. 7.

The Queen v. Hughes 194

SUBMISSION.

See AWARD.

TRESPASS AND TROVER, EVIDENCE IN.

Plaintiff had to prove title. His place of beginning was identified, and his description in the grant then read: "running south 52 chains to a large pine tree marked 'J. G.', and thence west," &c. To reach the locus the line should be extended about 50 chains more. To that increased distance the surveyor's line on the ground extended, but there was no pine tree so marked either at the distance expressed in the description or at the end of the surveyor's line. At the latter point, however, a *spruce* tree was marked "H. G." and "J. G." The plan attached to the grant represented the lot as of a different shape from that claimed, and the area expressed in the grant was inconsistent with plaintiff's contention.

Held, by McDONALD, C. J., and WEATHERBE and THOMPSON, J. J., that the plaintiff had given no evidence of title to the locus, and by RIGBY, J., that the preponderance of evidence was against plaintiff's contention.

Verdict for plaintiff therefore set aside.

Gates v. Davidson et al. 431

TROVER FOR GOODS SOLD BY WIDOW OF INTESTATE.

The widow of an intestate disposed of a pair of oxen belonging to the intestate's estate for "a barrel of flour, cash, and other things," and applied the proceeds to her own sustenance.

Held, in an action of trover by the administratrix, that the buyer should have known from the manner of the sale that it was not made in due course of administration; that there was no reasonable ground for supposing that the widow had authority to sell; and that a sale for such a consideration was not a lawful one, or such as the administrator would have been bound to perform in due course of administration.

Maher v. Hubley 295

———, PLEA DENYING PLAINTIFF'S PROPERTY,

See PLEADINGS.

See also NEGLIGENCE.

UNDISCLOSED PRINCIPAL.

See PRINCIPAL AND AGENT.

UNDUE INFLUENCE.

See WILL.

VERDICT AGAINST CHARGE, SUSTAINED.

On a suit to recover a sum of money claimed by plaintiffs to be due from defendants, the latter produced a receipt for the amount which plaintiffs swore was given under the impression that a bill paid with others by one of the defendants was a £10 bill whereas it proved to have been a bill for only \$5.00. The learned Judge charged the jury that the preponderance of evidence was with the plaintiffs, but the jury having found for the defendants, and two previous trials having resulted in the same way, the court refused to set the verdict aside.

Lynds et al. v. Hoar et al...... 148

WAIVER OF CONDITION.

See INSURANCE, FIRE, 2.

WARRANTRY.

See INSURANCE, MARINE, 3.

WILL.

The evidence upon which it was sought to set aside a will showed only marked eccentricities of behaviour, and the will, although made in favor of the solicitor of the testatrix, was shown not to have been prepared by him and to have been made without any pressure from him and as the free act of the testatrix.

Held, that the decision of the Judge of Probate sustaining the will must be affirmed.

In re Estate of Wilkie..... 543

—, REVOCATION OF FORMER BY LATER.

Plaintiff claiming a partition set up a sheriff's deed of the interest of J. LeBlanc which she claimed as heir to her mother. Defendant proved a will made by the mother's ancestor devising the lands in question in such a way as to disinherit her. Plaintiff set up as a revocation of the will a later will, but it was not shown that the later will devised any part of the land claimed in the partition suit, and it contained no clause of revocation.

Held, that there was no revocation shown and the verdict must be entered for defendant, (under a rule enabling the court to enter verdict for either party.)

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WINDING UP ACTS.

See COMPANIES WINDING UP ACT.

See also PRACTICE, MOTION TO RESCIND.

WINDING UP ORDER, REQUISITES OF.

See COMPANIES WINDING UP ACT.

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